

1                   IN THE UNITED STATES DISTRICT COURT  
2                   FOR THE EASTERN DISTRICT OF TEXAS  
3                   TYLER DIVISION

3 SOVERAIN SOFTWARE                   )  
4                   - vs -                   )     DOCKET NO. 6:07cv511  
5                   NEWEGG, INC.                   )     Tyler, Texas  
6                   )     1:05 p.m.  
7                   )     April 27, 2010

8                   TRANSCRIPT OF TRIAL  
9                   AFTERNOON SESSION  
10                  BEFORE THE HONORABLE LEONARD DAVIS,  
11                  UNITED STATES DISTRICT JUDGE, AND A JURY

12                   A P P E A R A N C E S

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24 Proceedings taken by Machine Stenotype; transcript was  
25 produced by a Computer.

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1 P R O C E E D I N G S

2 COURT SECURITY OFFICER: All rise.

3 (Jury in.)

4 THE COURT: Please be seated.

5 All right. You may proceed.

6 MR. HANSON: Thank you, Your Honor.

7 G. WINFIELD TREESE, PLAINTIFF'S WITNESS,

8 PREVIOUSLY SWORN

9 CROSS-EXAMINATION (CONTINUED)

10 BY MR. HANSON:

11 Q Mr. Treeese, why did you leave Open Market?

12 A There was a difference of opinion in the  
13 technology strategy.

14 Q And what was that difference of opinion?

15 A The CTO was not interested in pursuing some  
16 projects that I had been involved in developing.

17 Q What were those projects?

18 A They were a new architecture for the software  
19 that would allow some new flexibility in doing a larger  
20 range of business transactions.

21 Q So it would be accurate to say that Open  
22 Market was no longer the exciting challenge you describe  
23 as your reason for joining Open Market?

24 A The company had changed.

25 Q At the time you left, was Open Market

1 profitable, if you know?

2 A Not to my knowledge.

3 Q At the time, were Open Market's revenues  
4 rising or falling?

5 A I don't recall.

6 Q Was the marketplace very competitive at that  
7 time?

8 A In 2000 the marketplace was competitive.

9 Q And who were some of the Open Market  
10 competitors at that point in time?

11 A Companies included Broad Vision, Art  
12 Technology Group, a number of others I don't recall  
13 right now.

14 Q Broad Vision and Art Technology?

15 A Yes.

16 Q What products did Broad Vision provide?

17 A To the best of my recollection, Broad Vision  
18 provided software that was focused on discovering what  
19 individuals liked to buy most in order to market more  
20 effectively to them.

21 Q And what did Art Technology provide?

22 A Art Technology provided web design and systems  
23 that integrated both electronic commerce and content  
24 presentation.

25 Q And is it true then that somehow that competed

1 with the Transact product?

2 A Those companies did not compete directly with  
3 the functionality of the Transact product.

4 Q So in what way did they compete with Open  
5 Market?

6 A At that time Open Market had a range of  
7 products for catalog presentation, for content  
8 management, as well as Transact.

9 Q Now, I apologize for going back to this  
10 enterprise and commercial service provider licenses. I  
11 guess I'm slow.

12 Can you explain, would a licensee selling its  
13 own products be more likely to take the enterprise or  
14 the commercial service provider license?

15 A A company that was selling its own products  
16 would be more likely to take the enterprise license,  
17 because it was for what they were doing.

18 Q Now, I believe you mentioned that both of the  
19 licenses had basically two parts; is that correct? Let  
20 me finish -- expand the question. An upfront payment  
21 and subsequent payments for maintenance?

22 A Both of those would be included in both  
23 licenses, yes.

24 Q So there was an upfront payment and then there  
25 were ongoing payments for both licenses?

1           A     Yes.

2           Q     And did all of the licensees opt for the  
3 continuing payments so that they would be provided the  
4 maintenance services?

5           A     That was certainly most common. I don't know  
6 if there were any that chose not to.

7           Q     Did some of the customers do their own  
8 implementation?

9           A     I'm not sure what you mean by their own  
10 implementation.

11          Q     Did the Transact product have to be configured  
12 somehow to a particular business?

13          A     Yes, it did.

14          Q     And so, did some of the customers do that on  
15 their own or did they have Open Market do that for them?

16          A     Many customers had Open Market do that for  
17 them. I don't know if some chose to do it themselves.

18          Q     Now, you mentioned a dollar amount, and I  
19 believe it was for the -- for the enterprise license.  
20 You mentioned 125,000 to 250,000; is that correct?

21          A     That's correct.

22          Q     And was that an upfront payment?

23          A     I believe that that was the normal case, yes.

24          Q     And there could have been payments beyond  
25 that. Is that what you're suggesting?

1           A     It's possible. The details of the some of the  
2 deals varied.

3           Q     And -- and you really, at this moment, don't  
4 have the details at your -- at your -- at the tip of  
5 your fingertips?

6           A     I was not involved in negotiating the details  
7 of the pricing.

8           Q     One last question: What is your hourly rate  
9 for participating today?

10          A     \$425 an hour.

11                   MR. HANSON: I'm finished, Your Honor.

12                   THE COURT: Thank you.

13                   Redirect?

14                   MR. ADAMO: None is necessary, Your  
15 Honor. Thank you.

16                   THE COURT: All right. Thank you.

17                   You may step down.

18                   Who will be your next witness?

19                   MR. ADAMO: Mr. Roth, Your Honor, with  
20 the Court's permission, is going to call Ms. Wolanyk.

21                   THE COURT: All right.

22                   MR. ROTH: May it please the Court,

23                   Ladies and Gentlemen of the Jury.

24                   KATHARINE WOLANYK, PLAINTIFF'S WITNESS, SWORN

25                   DIRECT EXAMINATION

1 BY MR. ROTH:

2 Q Would you identify yourself, please, for the  
3 jury?

4 A My name is Katharine Wolanyk.

5 Q And I believe you've been identified as the  
6 president of the Plaintiff in this case, Soverain  
7 Software?

8 A The president and the chief legal officer,  
9 yes.

10 Q Ms. Wolanyk, if we do our job here today, in  
11 the next 30 minutes or so, I would like to get the jury  
12 to -- or get you to inform the jury a little bit about  
13 yourself, a little bit about Soverain, and perhaps  
14 answer Mr. Sayles' question about what we're doing here.

15 Tell us about yourself. Where are you from?  
16 Where did you grow up?

17 A I was born and raised in a small town,  
18 Wheatfield, New York, near Buffalo, New York.

19 Q And did you attend college?

20 A I did. Michigan State University.

21 Q And what did you study at Michigan State?

22 A Engineering.

23 Q And what type of engineering did you do?

24 A It was a general engineering program.

25 Q After getting your degree in engineering, what



1 was your first employment?

2 A I moved to the West Coast to work for Hughes  
3 Aircraft Company in Los Angeles.

4 Q And did you work -- how long did you work for  
5 Hughes?

6 A I was with Hughes for eight years.

7 Q And doing engineering work?

8 A Systems engineering work, yes.

9 Q What particular project were you involved with  
10 in the eight years you were at Hughes?

11 A I worked on the design and implementation of  
12 the B2 Stealth Bomber radar system.

13 Q And out of my own curiosity, I would like to  
14 ask you a lot more about exactly what you did on the  
15 Stealth Bomber, but when I asked you that question you  
16 told me it was still classified; is that right?

17 A That's correct.

18 Q After eight years at Hughes, what did you do?

19 A I left to go to law school.

20 Q And where did you attend law school?

21 A The University of Chicago law school.

22 Q And could you explain for the jury just what  
23 it is, after a successful starting career as an  
24 engineer, that would possess you to go to law school?

25 A I wanted a new challenge, and I felt that

1 would be a good fit for me.

2 Q So you attended the University of Chicago Law  
3 School?

4 A That's correct.

5 Q And what year did you graduate?

6 A 1996.

7 Q Did you pass the bar?

8 A I did.

9 Q And where did you go to work?

10 A I went to work for a law firm, Latham &  
11 Watkins in Chicago.

12 Q And Latham & Watkins is, shall we say, a very  
13 large law firm, one of the largest in the world?

14 A That's correct.

15 Q What we refer to around here in East Texas as  
16 tall-building lawyers.

17 A Correct. We were in the Sears Tower, so we  
18 would be very TBL.

19 Q How long -- what type of work did you do? Did  
20 you do litigation? Did you do -- what type of lawyering  
21 did you do?

22 A I did not do litigation. I was a corporate  
23 attorney, and because of my engineering background, I  
24 did work predominantly with technology companies.

25 Q So you -- you weren't a courtroom lawyer by

1 any means?

2 A I was not.

3 Q Have you ever testified in court before?

4 A This is my first time in a courtroom.

5 Q It's a little intimidating, isn't it?

6 A It is.

7 Q It's not what you expect. We will try to make  
8 it easy for you.

9 A All right. Thank you.

10 Q Mr. Sayles can be kind of rough, but he can't  
11 eat you, so you will be okay.

12 The -- how long did you stay at Latham &  
13 Watkins?

14 A A little over three years.

15 Q And what did you do when you left Latham &  
16 Watkins?

17 A I left Latham to go to work for a company  
18 called Divine in Chicago.

19 Q All right. So this is the Divine that we've  
20 heard talked about a little bit before?

21 A The very same, yes.

22 Q Okay. Tell us a little bit about Divine.

23 What kind of company was it?

24 A Well, it was an internet-focused -- originally  
25 an investment company. And it was 1999. You know, the

1 climate was very good for internet companies, and this  
2 was a very exciting company to be part of in Chicago.

3 Q Did -- was -- was Divine just getting started?  
4 Had it just been formed?

5 A It was -- yes, it was a startup.

6 Q Who was the founder of Divine?

7 A Andrew Filipowski.

8 Q And tell us a little bit about Mr. Filipowski?

9 A He went by Flip. It was easier to say than  
10 Filipowski, I guess. And he was -- had been previously  
11 the chairman and CEO of a company called Platinum  
12 Technology in Chicago. Very successful company. I had  
13 done a lot of legal work for Platinum previously, so I  
14 came to know him. And Platinum had grown very rapidly  
15 through acquisitions of great technology companies and  
16 had just been sold for \$3-1/2 billion shortly before  
17 Divine was formed.

18 Q And how did -- what was the business plan at  
19 Platinum? What had he done to, in a couple of years,  
20 build an enterprise that sold for \$3-1/2 billion?

21 A These were very smart judges of software  
22 technology and were able to acquire companies and put  
23 them together and then develop those products together  
24 and sell them very successfully in the marketplace.

25 Q So, I think he put -- integrated about 70

1 small companies into one company, basically?

2 A That's correct.

3 Q And then so apparently -- was Divine his  
4 effort to, if he had done it once, he was going to do it  
5 again?

6 A Absolutely. That was the plan.

7 Q Where did he get his management team?

8 A The bulk of the management team had come from  
9 the executive team at Platinum. And I was the first  
10 non-Platinum employee to join.

11 Q Any other females?

12 A There were a few females, but I was the only  
13 executive.

14 Q Was Flip successful in raising money for his  
15 new venture with the credibility that he had already  
16 established with a 3-1/2 billion dollar venture?

17 A Yes, it was a very, very exciting opportunity.  
18 A large number of companies invested right away in the  
19 first few months; Microsoft, Hewlett-Packard, Compaq,  
20 Level 3. A number of big, big companies invested about  
21 \$300 million.

22 Q Did Divine set about to follow up the plan to  
23 expand and build another Platinum, or hopefully build  
24 another Platinum?

25 A That was -- that's what we set out to do, yes.

1           Q     Well, tell us what happened over the next  
2 couple of years. Starting in 1999, what happened over  
3 the next couple of years?

4           A     Well, the company was formed in 1999. We  
5 raised, as I said, a lot of capital. We went public in  
6 the mid-part of 2000 and raised another 400 million or  
7 so. So we had a big war chest.

8                     And from there we started acquiring companies  
9 and trying, as best we could, to -- to pick the right  
10 companies and put them together and integrate them  
11 successfully.

12          Q     How big did Divine get at its peak?

13          A     At its peak we were about 3000 employees. I  
14 think we had 50 or so software products, somewhere  
15 between 6 and \$700 million in revenues.

16          Q     How many locations worldwide?

17          A     I don't know. Many.

18          Q     More than 20?

19          A     Yes.

20          Q     Did Divine also form alliances with other  
21 companies?

22          A     We did. That was one of the ways that you  
23 would sell software is you would work with other  
24 technology companies. And we did work with Microsoft  
25 and IBM, Hewlett-Packard, Compaq, Dell; all the big

1 companies.

2 Q Now, during your four years there, what were  
3 your job duties?

4 A I started out as the acting general counsel.  
5 And after the general counsel was able to join from  
6 Platinum, then I went and moved into the business part  
7 of the company. And I was on the corporate senior vice  
8 president of corporate development. And later on chief  
9 alliance officer, as well; managed the strategic  
10 alliances for the company.

11 Q So as Divine evolved, so did your job  
12 responsibilities?

13 A I'm sorry?

14 Q As Divine evolved, so did your job  
15 responsibilities?

16 A Yes.

17 Q Was one of the companies -- how many companies  
18 did you buy in that two-year period?

19 A Over 30.

20 Q All right. And was one of those companies a  
21 company called Open Market that we have heard Mr. Treese  
22 talking about?

23 A Yes.

24 Q Were you involved in any way with that  
25 purchase?

1           A     Yes.  As I said, I was on the -- in the  
2     corporate development organization, which was the  
3     organization that's tasked with identifying good  
4     companies and going out and investigating their -- their  
5     capabilities and then negotiating a deal to acquire  
6     them.

7           Q     Okay.  Did you, as part of your investigation,  
8     learn about Open Market and the technology that it owned  
9     and the products that it had?

10          A     Yes.

11          Q     And the decision was made to purchase Open  
12     Market?

13          A     Correct.

14          Q     Okay.  And do you recall when that was?

15          A     I think it was in mid-2001.

16          Q     Okay.  The -- do you recall what Divine paid  
17     to purchase Open Market?

18          A     It was approximately \$70 million.

19          Q     \$70 million?

20          A     70.

21          Q     Now, we've heard some references to it, and I  
22     want to put it back in the time frame, but everybody's  
23     heard, I guess, of the dot-com bubble.  Give us your  
24     description about what that era was in the late  
25     '90s/early 2000 period.



1           A     Well, the dot-com bubble related to internet  
2     companies, and there were lots of companies that were  
3     forming and growing very rapidly and going public. This  
4     was in the late '90s. And the bubble, so to speak,  
5     burst in mid-2000. And after that a lot of these  
6     companies that had been very successful failed; a lot of  
7     companies that had been worth a great deal of money,  
8     suddenly were not and were laying off employees and  
9     struggling to survive.

10          Q     Okay. Did the dot-com bubble bursting, affect  
11     Divine?

12          A     It did, because we initially were focused on  
13     investing in companies. But as the valuations came down  
14     and companies became more available, we turned to  
15     acquiring companies, because there just were so many  
16     great technologies companies that we could afford  
17     suddenly.

18          Q     Well, what happened to Divine eventually?

19          A     Eventually we grew too big too fast. We  
20     didn't manage to make it, and we broke up and sold.

21          Q     While you were successful in raising a whole  
22     lot of capital, hundreds of millions of dollars  
23     originally, after the dot-com bubble burst was there any  
24     more -- anybody else willing to invest in this company;  
25     put it that way?

1           A     Well, we were -- we were public as well, so we  
2     had investors in that regard. But it was a tough time.

3           Q     What was kind of the last straw for Divine?  
4     Was there a particular purchase made that required an  
5     awful lot of immediate cash that just wasn't available?

6           A     Yes. There was one company WorldCom that we  
7     acquired somewhat -- it was heavily debated within the  
8     corporate development team, but we did acquire them.

9                     And because of the nature of their business,  
10    it required a lot of cash. And it ended up being a big  
11    problem for the company.

12          Q     Now, when the financial troubles came down on  
13    Divine, how did it affect these 35 subsidiaries that  
14    they had already acquired? Did it have an impact on  
15    them?

16          A     Well, we had gone through -- in the process of  
17    trying to integrate them, we had reorganized. We had  
18    tried to kind of put products together and did a lot of  
19    changes to try to survive.

20          Q     Let me interrupt you to turn your mic a little  
21    bit to the side again. You're having the same trouble  
22    that Win did.

23                     Were there cutbacks in employees, reduction in  
24    staff?

25          A     Yes.

1 Q All of the usual type of things?

2 A Yes.

3 Q Let's talk about Open Market in particular.

4 Did it go through a period of neglect due to  
5 the financial strain on Divine?

6 A It did. It wasn't alone in that regard.

7 Because we had acquired so many companies and had so  
8 many software products, as we were trying to integrate  
9 and also get the company the right size, there was a lot  
10 of products that just didn't get the attention; and Open  
11 Market's Transact product was among them.

12 Q Okay. Did Open Market lose a lot of its  
13 customers?

14 A It did.

15 Q Lose its engineering staff?

16 A A lot of the engineering staff did move on.

17 Q What eventually happened to Open Market and  
18 the other various subsidiaries of Divine?

19 A The company was broken up and sold to  
20 different investors.

21 Q Okay. That brings us to talking about  
22 Soverain Software. Was Soverain Software formed by some  
23 investors specifically for the purpose of purchasing  
24 what was left of Open Market?

25 A Yes.

1 Q Who were the investors?

2 A The investors --

3 Q Who leads the industrial group, if you would?

4 A The investors were a group from New York that  
5 were originally interested in buying a separate part of  
6 Divine. And in the course of working with them on that  
7 transaction, I suggested to them that there was an  
8 opportunity they should also consider.

9 Q Okay. The -- tell us what your role was in it  
10 coming about that Sovereign was formed to purchase Open  
11 Market.

12 A Well, I had always thought of Open Market as  
13 one of the best parts of Divine. When we acquired it, I  
14 was very impressed with the product, the customers they  
15 had, the history, the patent portfolio.

16 So when this kind of dismantling of Divine was  
17 going on, I saw it as an opportunity, a business  
18 opportunity that I thought with the right approach could  
19 be very successful. So I suggested it to these  
20 investors thinking perhaps they would be interested.

21 Q Okay. And they decided to follow your advice  
22 then and purchase that asset?

23 A We did.

24 Q Now, you might recall hearing Mr. Sayles in  
25 his opening statement saying that Open Market and

1 Transact had never been successful. Do you -- do you  
2 share that view?

3 A I do not. I do not at all.

4 Q Tell us what your knowledge of Open Market's  
5 success was with the product Transact in particular,  
6 during the late '90s?

7 A Well, Open Market was not only, you know, very  
8 well-known as a company, but its Transact product was --  
9 was one of the very first E-commerce software products,  
10 and it grew very rapidly. By 19 -- 1999 it commanded  
11 over 30 percent of the E-commerce software market  
12 dwarfing all the other competitors, including companies  
13 like Microsoft and IBM. So from that perspective, the  
14 Transact product was very, very successful.

15 Q I am looking at exhibit -- well, it's actually  
16 got two exhibit numbers on it. It's already in  
17 evidence, Plaintiff's Exhibit 149 and Defendant's  
18 Exhibit 220. And I'm not going to bother putting it up  
19 on the board or anything.

20 But this document is an Open Market report,  
21 and it's an Open Market document, but it indicated that  
22 Open Market's share from 1998 of the entire E-commerce  
23 software program was 30 percent -- 29.8 percent.

24 A Correct.

25 Q Okay. Is that one of the facts that you were

1 aware of when the decision was made to purchase Open  
2 Market for Divine?

3 A It was one -- one of the facts, as well as  
4 their customer list.

5 Q Okay. Who were some of the customers that  
6 Open Market had during the point of time that you were  
7 investigating it to be purchased by Divine?

8 A Well, at the time we were looking at them to  
9 purchase them for Divine, as you've heard Mr. Treese  
10 testify, there were -- there were some of the biggest  
11 companies in the world; AT&T, Disney, Sony, Time-Warner,  
12 Business Week, the McGraw-Hill publishing companies.  
13 There were very, very large companies.

14 Q And those are companies that had selected  
15 Transact as the software to run their websites?

16 A Correct.

17 Q Okay. This same document indicates that big  
18 competitors in '98 included Microsoft. Do you know  
19 what -- do you recall what Microsoft's market share was  
20 compared to Open Market's 29.8 percent?

21 A I believe at the time it was around two to  
22 three percent of the market.

23 Q And this document actually says it was 3.7  
24 percent. Does that fit?

25 A That sounds right.

1 Q Oracle's was 2.5 percent?

2 A Right.

3 Q IBM was 2.4 percent?

4 A Right.

5 Q Okay. Has that circumstance changed today?

6 A It's about reversed, yes.

7 Q When financial difficulties came and Open  
8 Market's business fell under a period of neglect under  
9 Divine's management, what happened with respect to  
10 market share to these other -- the big boys, so to  
11 speak?

12 A Well, Transact is a product that's -- it's a  
13 very complex product. It's intended to run either large  
14 companies' E-commerce websites or, in the case of  
15 commerce service providers, to run a lot of companies'  
16 websites. And there's changes that are needed to be  
17 made on a constant basis.

18 And so what happened in the waning days of  
19 Divine is that the engineering development that needed  
20 to go on was not happening. Customers weren't getting  
21 the support they needed, so they would logically make  
22 the decision, especially when E-commerce needs to be  
23 working to be successful, they would make the decision  
24 to move to a different product or build their own  
25 website.

1           Q     Tell us what happened after you persuaded this  
2 group of investors to purchase the Open Market assets.  
3 And let me ask you what -- what assets did we purchase?  
4 When we talk about purchasing Open Market, they didn't  
5 just purchase patents, did they? What did you buy?

6           A     It was the Transact software business, so it  
7 was all of the source code and related documents that  
8 went with the software product. It was all of the  
9 customer contracts that we could recover. It was the  
10 existing customer relationships with the customers that  
11 was still there. And as well as the -- the related  
12 intellectual properties, the patents for the most part.

13          Q     Now, let me see how to phrase this. Was one  
14 of the conditions that these investors made when you  
15 were trying to persuade them to buy this business is  
16 that you would agree to become the CEO and run the  
17 company?

18          A     That was the only condition they would invest  
19 under, yes.

20          Q     Okay. What did they tell you they wanted to  
21 do after they hired you to run the company?

22          A     Well, they wanted me to move as quickly as we  
23 could to re -- you know, reengage an engineering team,  
24 to reach out to the customers and try to get that  
25 situation stabilized, and ultimately to make money.



1           Q     Well, a little more basic than that. Like  
2 every investor that buys a company, they want the CEO to  
3 go make money.

4           A     That's right.

5           Q     And how do you make money with a technology  
6 company such as Soverain? What -- what do you do? What  
7 is your sources of making money when you have the kind  
8 of assets that Soverain owns?

9           A     If you're lucky enough to have a product, as  
10 we do, you develop that product, you support that  
11 product, you sell that product, and you make money from  
12 that side of the business.

13          Q     And the product -- the principal product at  
14 least is Transact?

15          A     That's correct.

16          Q     Were there some other programs as well?

17          A     There are some smaller programs, but Transact  
18 is the main product.

19          Q     All right. And what else can you do to make  
20 money when you own a technology company?

21          A     Well, in our case, I thought that the  
22 licensing of the patents also would be a good business.

23          Q     Okay. So if we can, we can kind of look at  
24 it, there's two aspects of the business enterprise. One  
25 is your software side, the software, the Transact

1 program that you can sell and service.

2 A Right.

3 Q Okay.

4 The other major asset is the patent portfolio  
5 that you said you licensed; is that it?

6 A That's correct.

7 Q And how many patents does Soverain own?

8 A Right now we have over 50 pending and issued  
9 patents.

10 Q Okay. Is that worldwide or just in the United  
11 States?

12 A Worldwide.

13 Q Including the patents that are the subject of  
14 this lawsuit are three of those patents; is that right?

15 A Correct.

16 Q All right. You mentioned licensing. And,  
17 essentially, when you own -- well, you've heard the  
18 reference that has been made about a patent being like a  
19 deed to real estate.

20 A Uh-huh.

21 Q But having a patent portfolio is like opening  
22 an office building, and you can rent the right or  
23 permission to use an office in the office building in  
24 exchange for money?

25 A Correct.

1           Q     And make money based on the asset that you  
2 own; is that it?

3           A     That's right.

4           Q     And patent licensing is similar to that. You  
5 give permission to another company to use the technology  
6 that you have the exclusive right to?

7           A     That's correct.

8           Q     And that's called a license?

9           A     Yes.

10          Q     Now, let's talk first about the software side  
11 of the business.

12                   When you took over what was left of Open  
13 Market, what -- what did you find? What kind of shape  
14 was it in?

15          A     It was -- it was a big challenge. I was it  
16 initially. And so we -- initially, I needed to figure  
17 out what there was that I could reconstitute. I needed  
18 to hire an engineering team; and we had customers  
19 calling us saying, you know, we're using your product,  
20 when are you going to start supporting it, investing in  
21 it.

22          Q     Did it have an established office somewhere?

23          A     There was no office, no.

24          Q     Did it have any employees left?

25          A     No.

1           Q     So how did you go about reviving the software  
2 business? What's first thing you did?

3           A     The first thing I did is I called another  
4 former Divine executive that I knew, Casey Andrysiak,  
5 and talked to her about whether she would be willing to  
6 join Soverain to run our engineering team.

7           Q     And who was that?

8           A     Casey Andrysiak.

9           Q     Is Casey here in the courtroom today?

10          A     Yes, she is.

11          Q     Back there sitting in the back?

12          A     That's her.

13          Q     So did you talk Casey into coming into this  
14 venture as well?

15          A     I did. She was a little busy at the very  
16 moment I asked her, but she came onboard shortly  
17 thereafter.

18          Q     There is an interesting story about that, too,  
19 as I understood from talking to Ms. Andrysiak. Where  
20 was she when she accepted the job?

21          A     She was in the hospital giving birth to her  
22 first child.

23          Q     So where did she live at the time?

24          A     At the time Casey was in the Alexandria,  
25 Virginia, area.

1 Q And where does she live now?

2 A She lives at Ft. Hood, Texas, now.

3 Q And is her place of residence related to her  
4 husband's occupation?

5 A Yes. Casey's husband is an officer in the  
6 Army.

7 Q So they live in Ft. Hood where he's currently  
8 stationed?

9 A That's where he's stationed, yes.

10 Q What then did you and Ms. Andrysiak do to  
11 continue to try and revive Open Market from the ashes,  
12 so to speak?

13 A Well, there were engineers that had worked on  
14 the Transact product at Divine, and so the first thing  
15 we did is went out and tried to recruit them to rejoin.  
16 These are folks that had worked on the product for the  
17 last year or so -- or more actually -- and knew it, had  
18 worked with the customers, so they were at this point  
19 our best chance of being able to restart the business.

20 Q What about the customer files? Were you able  
21 to locate all of those?

22 A We did. It was a challenge. They were  
23 scattered all over the country, the world really,  
24 because Open Market had sold Transact all over the  
25 world. So our -- we had customers and contracts,

1 therefore, spread out everywhere.

2 Q Did you have people calling saying they were  
3 customers looking for support, that you didn't even have  
4 any record had been a customer?

5 A Yes. It was a little embarrassing to ask them  
6 if they could send us a contract so we could kind of  
7 figure out the circumstances, but that's how it worked.

8 Q Did you manage to put together an engineering  
9 team then to provide support for your customers?

10 A We did.

11 Q Okay. Where are the headquarters of Soverain  
12 now?

13 A Chicago.

14 Q And who is the actually located in Chicago?

15 A I'm in Chicago, and we have a couple of  
16 corporate people in Chicago.

17 Q Okay. You've already identified  
18 Ms. Andrysiak. What is her title?

19 A Casey is the vice president of technology.

20 Q Okay. And what is her educational background?

21 A Casey's got an engineering -- couple of  
22 engineering degrees, and I think an MBA as well.

23 Q Is Soverain what I would refer to as kind of a  
24 virtual company in the sense that you've got a small  
25 corporate headquarters, but your support staff and your

1 engineering staff is scattered out where they're needed?

2 A That was -- that was the way we hired folks.

3 We, you know, wanted to get the people that we needed to

4 get and couldn't insist that they all move to Chicago

5 just because I was there, so we worked it out that way.

6 Q A lot of your engineering support is from

7 overseas?

8 A That's correct. That's where they were

9 previously, and so we kept them.

10 Q Mr. Treese indicated that he has a consulting

11 agreement. Were you able to locate others of the

12 original inventors?

13 A (Nods head.)

14 Q Have you made arrangements with, not only with

15 Mr. Treese, but some of the other original inventors to

16 work with Soverain?

17 A Yes.

18 Q Okay. What type of arrangement is this?

19 A They are consulting agreements.

20 Q They are not employees as such?

21 A They're not employees. Again, many of them

22 had moved on to other opportunities and so weren't

23 available necessarily to be full-time employees, or had

24 other projects they were working on.

25 Q What -- in addition to Mr. Treese, who else

1 serves as a consultant?

2 A Larry Stewart, Andy Payne, Thomas Levergood.

3 Q Okay. Now, how does that arrangement work?

4 When are they called upon to do their consulting  
5 services?

6 A Well, Larry and Win especially work with Casey  
7 and the team on Transact from time to time. They were  
8 the original architects of the product, and in many  
9 cases, are the only people that still can put together  
10 why something was done many years ago.

11 We also have a good-sized patent portfolio,  
12 and we continue to file patents and -- patent  
13 applications, that is -- and so the consultants will  
14 work with us in that regard, too.

15 Q Has -- have you been able, with the assistance  
16 of your engineering team, as well as the consultants, to  
17 upgrade Transact and keep it current?

18 A We believe so. We've brought out four or five  
19 versions of the product since we acquired the company,  
20 and are in the works with a new version right now.

21 Q I don't want to go into too much detail. I  
22 think we've heard enough from previous witnesses about  
23 ultimate details. But from an overview of this product  
24 Transact, I gather this is not something you go down to  
25 the local store and buy and bring home and put on your



1 computer like a CD; is that correct?

2 A Not even close.

3 Q This -- as Mr. Treese indicated, you -- it  
4 requires continuous maintenance and updating; is that  
5 right?

6 A That's correct.

7 Q So if I was going to find out what it would  
8 cost me to own a copy of Transact, what are the types of  
9 expenses or costs involved in using a products -- the  
10 product Transact?

11 A Depending on your type of business, you would  
12 first need to figure out how large of a license you  
13 needed. Then there would be the integration and  
14 installation charges that would go, because you have to  
15 connect that software, install that software and connect  
16 it to the other parts of your business so that you're  
17 able to sell things online. And then there is the  
18 annual maintenance and support that allows you to get  
19 updates to the product and custom engineering help and  
20 things like that over time.

21 Q So there were some questions about the  
22 licensing fees. And that is a fee for the right to use  
23 the software, the license fee?

24 A Right.

25 Q And that's an initial upfront cost?

1           A     Correct.

2           Q     And how is that -- is it still a two-tiered or  
3 two types of structures as Mr. Treese described Open  
4 Market did?

5           A     Yes, we still sell the product that way.

6           Q     All right. And -- and what is the cost of a  
7 license, just the bare license, and how is it priced?

8           A     We price Transact for an enterprise customer,  
9 kind of the basic license, it's based on the amount of  
10 computing power they need, extent of use, how big the  
11 site is going to be since it's per CPU.

12          Q     The \$150,000 number that you heard from  
13 Mr. Treese, is that still the same number or has it  
14 changed?

15          A     Yes.

16          Q     But it's per CPU; is that right?

17          A     That's how we price it, yes.

18          Q     And CPU stands for?

19          A     Central processing unit.

20          Q     Central processing unit?

21          A     Or computer processing, I'm sorry.

22          Q     So is the first thing you have to determine is  
23 how many -- how large the site's going to be, how many  
24 CPUs or central processing units it's going to require?

25          A     Uh-huh.

1 Q Is that right?

2 A Yes.

3 Q And then the license is based on how big the  
4 site is in that sense?

5 A Correct.

6 Q How much computing power is involved?

7 A How much computing power, how much traffic  
8 they envision, how many transactions they'll need to be  
9 doing, how many sites they'll be running; all of that is  
10 taken into consideration.

11 Q Now, after the initial license fee, you  
12 indicated there is implementation fees?

13 A Yes.

14 Q And describe how that works.

15 A The implementation is done with our  
16 engineering team working with the customer's technical  
17 people. And it can take -- as Win said, it can take  
18 months, if not longer, to beef that up.

19 Q And what does that involve? Does that require  
20 Soverain's engineering staff to go on site and perform  
21 the work?

22 A It can, yes. Often does.

23 Q Okay. And that's to connect all of the  
24 equipment and all the various servers and forms that  
25 they have got that they want to hook up together to make

1 it all integrate and work with Transact?

2 A Correct.

3 Q And every installation then is somewhat  
4 different?

5 A That's exactly right.

6 Q Now, why can't the customer just go modify the  
7 program to fit their own needs? Why -- why do you have  
8 to have implementation fees?

9 A Well, there's some very limited customization  
10 that the customer can do on their own. But in the end,  
11 they don't have the access to the source code that we  
12 do. So to do the actual implementation, we're the only  
13 ones that can do it.

14 Q Now, I don't want to go into this too deeply,  
15 but what do you mean by source code?

16 A Source code is the computer code that software  
17 programs are written in. And when you buy, say, a copy  
18 of software in a store, you're getting what's called  
19 object code, which is kind of a hidden version of how  
20 the program runs. You can't see the actual -- it's the  
21 crown jewels really of the software company, the source  
22 code.

23 Q The source code is what these people like Mr.  
24 Treese -- I guess I ought to be calling him Dr. Treese,  
25 he's got a couple of them -- sits down and actually

1 writes. It's a language that they write the  
2 instructions in that actually tell the computer what to  
3 do?

4 A That's right.

5 Q Is that right?

6 A That's right.

7 Q But the computer doesn't read source code,  
8 does it?

9 A Right.

10 Q It reads what they call object code?

11 A Correct.

12 Q So source code gets converted to object code?

13 A Correct.

14 Q But to change the program, you have to have to  
15 source code?

16 A That's correct.

17 Q And there are millions of lines of  
18 instructions or source code in Transact; is that right?

19 A That's correct.

20 Q So that's what you have to have to do the  
21 customization that the customer needs?

22 A Oftentimes, yes.

23 Q Okay. And a license to a software program  
24 doesn't give you access to the source code?

25 A No.

1           Q     If you say that's the crown jewels, that's  
2 kept locked away in a safe?

3           A     Right. Because, otherwise, then anyone could  
4 just copy it and that would be the end of your business.

5           Q     Now, how many customers -- have you been able  
6 to maintain or retain some customers out of the ashes of  
7 what was left of Open Market after Divine collapsed?

8           A     We did.

9           Q     How many customers do you have, or can you the  
10 tell the jury the names of some of the current customers  
11 that you've continued since 2003?

12          A     Well, we've brought back a number of  
13 customers: Reuters, Business Week, a number of the  
14 McGraw-Hill publishing family, Bureau of National  
15 Affairs.

16          Q     That's a publishing company as well?

17          A     That's a publishing company as well.

18          Q     Called BNA?

19          A     Right, BNA.

20                We have customers in Europe. The names  
21 wouldn't be familiar, but they were former Open Market  
22 customers that we were able to bring back.

23          Q     Let me ask you about the basic cost, if you  
24 would, for a customer. And let's take -- at my request,  
25 have you looked at a particular customer or gotten some

1 numbers together on a particular customer to be able to  
2 give the jury a flavor of what's involved with the  
3 actual costs of ownership?

4 A Yes. We took a look at one of our current  
5 customer's contract history to be able to get a sense of  
6 that, yes.

7 Q And I think that, for confidentiality reasons,  
8 I don't want to name it, but this is one of your current  
9 customers?

10 A It's one of our current customers, and it is a  
11 major customer.

12 Q And this particular customer started back in  
13 May of 1999?

14 A Correct.

15 Q Okay. It says the implementation time was 20  
16 months. What does that mean?

17 A This was a very complex installation. And it  
18 required, you know, a year and a half of a lot of time  
19 at customer sites, multiple customer sites, because this  
20 customer has operations all over the globe.

21 Q So they worked on it for 20 months before they  
22 could switch the key and turn it on?

23 A Yes.

24 Q The implementation fees I see to be \$715,000  
25 for that particular customer?

1           A     That's right.

2           Q     Do you recall what the initial license fee was  
3 for the number of CPUs they were using?

4           A     Well, again, this is a large customer. We  
5 tried to look at somebody who would have a very complex  
6 setup with a lot of transactions and a lot of traffic.  
7 And the initial license fee was \$650,000, I believe.

8           Q     \$653,000, to be exact?

9           A     653, right.

10          Q     So, but that 653,000 for the license was just  
11 kind of the very start?

12          A     That's correct.

13          Q     Implementation was another 700.

14                 Then there is a charge that shows here for  
15 maintenance and support fees on an annual basis starting  
16 with a pilot phase and continuing on right up to this  
17 year?

18          A     Yes.

19          Q     Okay. And those fees range anywhere from  
20 68,000 to 225,000 a year, according to this.

21          A     They keep our engineering team very busy, yes.

22          Q     Now, what are those fees related to? What  
23 kind of services are being performed that are necessary  
24 to run this copy of Transact?

25          A     As you said, that's the annual maintenance and



1 support. So every time we bring out a new version of  
2 the product, if they're current on their maintenance and  
3 support contract, they get access to the new version of  
4 the products.

5 Any type of support calls -- our customers run  
6 their E-commerce sites 7 days a week, 24 hours a day.  
7 And our engineering team is often working through  
8 weekends and in the middle of the night to keep their  
9 websites up and running. So they have access to the  
10 engineering team.

11 Q These kind of customers don't want their  
12 website to be down for one minute, do they?

13 A No. It's a major crisis if their website even  
14 just slows down.

15 Q Because it costs them money every minute it's  
16 down? People can't buy things.

17 A Exactly.

18 Q And it looks like they've spent \$2.9 million  
19 in the last ten years for that, for maintenance and  
20 support.

21 So the total cost of ownership for this major  
22 customer of Transact came out to about \$5.2 million; is  
23 that right?

24 A That's as of this year, and they are still a  
25 current customer.

1           Q     And it's going to continue to cost them as  
2 long as they continue to use the program?

3           A     That's correct.

4           Q     Now, have you been able to go out and recruit  
5 new customers?

6           A     We've certainly tried. And we've had a lot of  
7 opportunity, sales opportunities that we feel we've done  
8 very well in. But in the end, we've not been able to  
9 sell to any new customers.

10          Q     Okay. What kind of problem do you run into,  
11 with Transact at one point having a third of the market,  
12 now you're having trouble selling new copies? What's  
13 changed in the world?

14          A     Well, what's changed is that the, you know,  
15 the situation where Open Market had a huge market share  
16 years ago, and then they didn't maintain that is that  
17 the big players, the IBMs, the Microsofts, the Oracles  
18 of the world have moved in, and they now are the only  
19 game in town.

20                So even though technically Transact is a very  
21 good product, we find ourselves in sales situations  
22 where we're going head-to-head with some of the biggest  
23 companies in the world. It's hard to compete as a small  
24 company on that basis.

25          Q     It's just the old thing of a company with

1 eight to ten employees has trouble competing against IBM  
2 and Microsoft?

3       A     Well, that's the first part. The second part  
4 is -- is we're small, and we feel that we put a lot of  
5 support into our current customers. But in the end --  
6 and we've had it happened to us many times, that, in  
7 fact, a sales situation we were up against Oracle, and  
8 we were doing very well, and we thought the customer  
9 might choose us, and in the end they went with Oracle  
10 because Oracle said we'll just throw it in for free.

11           Now Oracle is selling the customer lots of  
12 other software, millions of dollars of software,  
13 database and otherwise. But we can't afford to give our  
14 product away for free.

15       Q     So when it came down, though, to a decision,  
16 basically, they had evaluated, and your engineers had  
17 made presentations and Oracle's had made presentations?

18       A     Months and months.

19       Q     Transact versus Oracle?

20       A     Uh-huh.

21       Q     Is that it?

22       A     That's it.

23       Q     But Oracle, of course, doesn't sell just  
24 E-commerce. They have a lot of other programs that that  
25 customer was going to be buying as well?

1 A Yes.

2 Q Millions of dollars worth?

3 A Millions of dollars.

4 Q And what wound up happening to you was, when  
5 it got close, Oracle just said: We'll give you the --  
6 we'll give you our E-commerce program for free if you  
7 buy the rest of it?

8 A Right.

9 Q So it was your price versus free.

10 A Hard to compete with that, yes.

11 Q So do you continue to try to sell Transact?

12 A We do.

13 Q And -- but let me just ask you the bottom  
14 line.

15 Despite all of these obstacles in the way of  
16 trying to get it raised up from the ashes and compete  
17 against the big boys, so to speak, has the software side  
18 of the business been profitable for your investors?

19 A Transact has been profitable every year since  
20 the very beginning we owned it.

21 Q From the very first year, you were able to  
22 turn a profit?

23 A Yes.

24 Q And you've turned a profit every year on the  
25 software side; is that correct?

1           A     That is correct, yes.

2           Q     All right. Well, let's turn now and talk a  
3 little bit about the other side of Soverain's business,  
4 and that is their property, their intellectual property,  
5 their patents, and your licensing program.

6                     How long did it take you and Ms. Andrysiak to  
7 get the software side stabilized enough where you could  
8 turn your attention over to the patent portfolio?

9           A     Probably four to six months before we were  
10 able to look toward the patents.

11          Q     All right. Now, how do you go about doing the  
12 licensing or patent licensing part of the business? Do  
13 you do that entirely in-house, or do you have outside  
14 help?

15          A     It requires outside counsel.

16          Q     Okay. So you employ outside counsel to assist  
17 you with the licensing process?

18          A     That's correct.

19          Q     And what does that entail? What kind of work  
20 do those lawyers do and the consultants that they hire?

21          A     We have to figure out who might be a possible  
22 licensee. We have to analyze, to the extent we can, the  
23 way their system operates on the web, and then we have  
24 to file suit.

25          Q     Okay. How do you go about -- when you've

1 identified somebody that you believe is using your  
2 patented technology that you think should be paying for  
3 the right to use your technology, how do you go about  
4 convincing them to do it?

5 A Well, it used to be that you would send  
6 letters or you'd get in contact with them somehow, and  
7 you would say, we would like to engage with you in a  
8 licensing conversation regarding certain patents.

9 Q Okay. So you'd tell them you think they need  
10 a license and ask them to sit down and have a business  
11 conversation?

12 A Right.

13 Q But you don't do that anymore; is that right?

14 A No.

15 Q In today's legal culture?

16 A Yeah. The rules have changed in recent years  
17 especially, that if you were to -- especially as a small  
18 company -- to contact a company about licensing your  
19 patents, that it would leave you open to being sued  
20 immediately.

21 Q So they can file a suit to claim your patents  
22 invalid, and they get to pick where they file it.

23 A Correct.

24 Q And if you contact several companies, you may  
25 wind up defending the validity of your patents from

1 Seattle to Florida --

2 A That's right.

3 Q -- to California --

4 A Which --

5 Q -- right?

6 A -- we just can't afford.

7 Q So the situation now is, I guess, you sue

8 first and talk later?

9 A Unfortunately, yes.

10 Q All right. Now, with this system, have you

11 successfully licensed your patents?

12 A We have.

13 Q All right. Give the jury an indication of

14 some of the major retailers in online shopping that have

15 taken a license, even though they got contacted first

16 with a lawsuit.

17 A Well, Amazon, Gap, Zappos, TigerDirect,

18 Shutterfly, Redcats USA.

19 Q All right. Do you consider your licensing

20 program then to be successful?

21 A I do. We do.

22 Q And the fact is that I guess out of the first

23 seven companies that you have tried to persuade to get a

24 license, six of them now have a license?

25 A That is correct.

1 Q Okay. And the answer to the question about  
2 what are we doing here, the company that you still  
3 believe is using your technology without permission and  
4 isn't willing to pay for it is Newegg?

5 A That's correct.

6 Q And that's why we're here today, and that's  
7 why we've got this lawsuit?

8 A That's correct.

9 MR. ROTH: We'll pass the witness, Your  
10 Honor.

11 THE COURT: All right. Cross-exam?

12 MR. SAYLES: May it please the Court.

13 CROSS-EXAMINATION

14 BY MR. SAYLES:

15 Q Ms. Wolanyk, with Mr. Roth's introduction, I  
16 do want to assure you I mean you no disrespect in asking  
17 you questions here today, but you understand that you  
18 are here as a corporate representative of Soverain, the  
19 party that brought this lawsuit.

20 A I do.

21 Q And like so many people in this room, you too  
22 are a lawyer --

23 A I am.

24 Q -- by training and education.

25 A That's correct.



1           Q     And even though you're not a litigation  
2 lawyer, you have worked with litigation lawyers very  
3 closely in your business; isn't that so?

4           A     That is very so.

5           Q     And you told us that this was the first time  
6 that you had testified in a courtroom a little  
7 earlier, right?

8           A     That's correct.

9           Q     But you have given what are called  
10 depositions, haven't you?

11          A     I have, yes.

12          Q     And you do understand the importance of a  
13 deposition, don't you?

14          A     I do.

15          Q     It's under oath, just like in court?

16          A     That's correct.

17          Q     And your lawyer is there, and the other lawyer  
18 who you're adverse to is there; is that right?

19          A     All kinds of lawyers, yes.

20          Q     And I suppose, in preparation for your  
21 testimony today, you probably reviewed your depositions,  
22 didn't you?

23          A     I did.

24          Q     And as I ask you some questions this  
25 afternoon, can I rely on your depositions?

1           A     You may.

2           Q     You answered some questions to Mr. Roth about  
3 the installation of Transact, the hookup and  
4 installation.

5                     Do you recall that subject?

6           A     I do.

7           Q     Isn't it true that Soverain has not licensed  
8 the Transact product to any licensee that was not first  
9 licensed by Open Market?

10          A     I said as much, yes.

11          Q     So with respect to these hookups and  
12 installations, since around 2001 there haven't been any  
13 new customers of Transact; isn't that right?

14          A     That is correct.

15          Q     So we have a nine-year period where there have  
16 been no new customers who have gotten a hookup or an  
17 installation of this Transact product?

18          A     That's not correct.

19          Q     No new customers that weren't first licensed  
20 by Open Market?

21          A     That part is correct.

22          Q     All right. And Open Market, to be clear,  
23 began selling Transact in 1996. You know that history,  
24 don't you?

25          A     I do.

1           Q     And the Transact product actually incorporates  
2     and reflects each of the claims that are asserted in  
3     these patents in this case; isn't that right?

4           A     The Transact product was developed at that  
5     time, yes.

6           Q     And Open Market's assets were purchased by  
7     Divine in 2001; isn't that right?

8           A     Yes.

9           Q     And since then, Divine has gone out of  
10    business; is that right?

11          A     Yes.

12          Q     And you indicated to the jury that Open Market  
13    was successful with Transact. But the fact is, Open  
14    Market never made a profit with Transact; isn't that  
15    right?

16          A     Open Market was operating at a time where  
17    companies took their money and put it into building the  
18    business faster and faster. So Open Market may not have  
19    been profitable, but the Transact product was  
20    successful, which, I think, is what I testified.

21          Q     All right. Let me restate the question that I  
22    just asked you.

23                 Even though Open Market sold the Transact  
24    product, Open Market never made an operating profit;  
25    isn't that so, ma'am?

1           A     I don't know for certain, but I would guess  
2     that to be the case.

3           Q     Divine acquired the rights to Transact and the  
4     patents from Open Market, correct?

5           A     Divine acquired all of Open Market.

6           Q     All of Open Market, which included Transact  
7     and included the patents; isn't that right?

8           A     That's true.

9           Q     And even though Divine had those rights and  
10    others, Divine lasted about 15 months; isn't that true?

11          A     Divine was in existence for four years.

12          Q     After it acquired Open Market, it lasted about  
13    15 months; isn't that so?

14          A     That's correct.

15          Q     Would you agree that Newegg is not a  
16    competitor of Soverain?

17          A     For the most part, yes. With the launch of  
18    Newegg Mall, arguably they're providing software to sell  
19    online, so I guess you would consider that a bit of a  
20    competitor.

21          Q     But mostly Newegg would fall in the category  
22    of what you would call a potential customer --

23          A     Yes.

24          Q     -- isn't that right?

25          A     Yes.

1           Q     And Mr. Roth brought this out, but even though  
2     you would consider them a potential customer, they were  
3     not approached about a license to Transact before the  
4     suit was filed.

5           A     That's correct.

6           Q     These patents-in-suit have been licensed from  
7     time to time; isn't that right?

8           A     Yes.

9           Q     So we're talking about two different types of  
10    licenses: Patent licenses and then Transact licenses.

11                   Two different things, right?

12          A     Very different things, yes.

13          Q     And with regard to the patent licenses --  
14    licenses that have been entered into, isn't it correct  
15    that they have all been lump sum except for one?

16          A     There are over 40 licenses, and I can't say  
17    I've got them all memorized, to be honest, but I would  
18    say you're correct. The bulk of them are lump sum.

19          Q     Okay. And by lump sum, what we mean is that a  
20    party that's getting a license pays a negotiated fee  
21    upfront for a license that extends the life of the  
22    patent. That's the concept, isn't it?

23          A     That's correct.

24          Q     And that's contrasted from what's called a  
25    running royalty where a party might pay on a transaction

1 basis or year to year, isn't it?

2 A Yes.

3 Q And from Soverain's standpoint, it would like  
4 to have a running royalty in certain situations; isn't  
5 that right?

6 A We are willing to entertain it, sure.

7 Q But the licensees, for the most part, have  
8 insisted on these lump-sum licenses; isn't that so?

9 A True.

10 Q With respect to Transact, you've talked, in  
11 response to Mr. Roth's questions, about ongoing fees.

12 Those ongoing fees are for maintenance and  
13 services; isn't that right?

14 A The maintenance support ongoing fees are. We  
15 also have customers who do custom engineering work, and  
16 that's separate, and that can be ongoing.

17 Q And as a matter of fact, there are licensing  
18 fees for those customers who do use Transact; isn't that  
19 right?

20 A That's true.

21 Q And those, too, are, without exception,  
22 lump-sum upfront amounts; isn't that so?

23 A I believe that's correct.

24 Q Ms. Wolanyk, you understand that the damages  
25 are measured by a reasonable royalty, and that's what

1 you've told the jury that you're seeking here; is that  
2 right?

3 A Yes.

4 Q And you understand from this case, that the  
5 hypothetical negotiation to establish that royalty would  
6 have occurred in 2001, the time of the alleged first  
7 infringement.

8 A Yes.

9

10 Q And at that time, it was Open Market that  
11 owned these patents, wasn't it?

12 A Yes, I believe so.

13 Q So if we go to the hypothetical negotiation,  
14 at the table, we would have Open Market on one end and  
15 Newegg on the other end; is that right?

16 A At that timeframe, yes.

17 Q Right. And in January of 2001, Open Market  
18 was about nine or ten months from being completely  
19 acquired; isn't that right?

20 A Yes.

21 Q And you understand from what you've heard in  
22 the courtroom and your knowledge of history, that Newegg  
23 was a new "up-start" company itself in 2001; isn't that  
24 right?

25 A I thought --

1 Q You don't know that?

2 A I thought that they had had a computer  
3 business or something at that point.

4 Q They did.

5 You know that they were not an online retailer  
6 of electronics until 2001.

7 A That I do know, yes.

8 Q And you -- you've seen their -- the numbers on  
9 them. It's been talked about in the courtroom. And  
10 they've been growing, right?

11 A Correct.

12 Q And it's fair to say that compared to today,  
13 it's a much different picture than it was in 2001 for  
14 Newegg; isn't that right?

15 A They are much more established now, yes.

16 Q Right. In terms of the number of sales, they  
17 have many more today than they did in 2001, right?

18 A Yes.

19 Q Their -- their status and future is much more  
20 secure today than it would be in 2001; wouldn't that be  
21 a fair statement?

22 A Seems so, yes.

23 You know that Open Market itself actually  
24 licensed these patents-in-suit at least a few times.

25 You know that from the history --



1 A I do.

2 Q -- and the acquisition, don't you?

3 A I do.

4 Q And prior to around 2002, the largest license  
5 was to Johnson & Johnson, isn't that right, for these  
6 patents?

7 A I'm sorry. The timeframe prior to --

8 Q Well, let me -- let me just ask you, if you  
9 would, to look at Exhibit 223, because I realize there's  
10 a lot of paper here.

11 I'll ask you if you recognize this as a patent  
12 license agreement that's in evidence dated June the 5th,  
13 2000 -- between Open Market on the one hand and Johnson  
14 & Johnson Vision Care on the other hand.

15 A Yes.

16 Q And from your knowledge of Soverain and its  
17 representative, you're aware of this piece of history --

18 A Oh, yeah.

19 Q -- aren't you?

20 And Johnson & Johnson Vision Care is the  
21 company that makes contact lenses that is almost a  
22 common household name; is that true?

23 A I think so.

24 Q And if you turn to Page 2 of the license,  
25 under license grant to licensee, is it correct that Open

1 Market hereby grants the licensee a non-exclusive,  
2 worldwide, paid-up license under the licensed patents to  
3 make, have made, and use licensed products in and for  
4 the field of use.

5 That was the breadth of the license, wasn't  
6 it?

7 A Yes.

8 Q And the license fee is in Paragraph No. 3  
9 right below that.

10 Do you see that?

11 A I do.

12 Q And that was for Open Market to pay a  
13 one-time, non-refundable license fee of \$100,000; is  
14 that right?

15 A Yes.

16 Q And isn't it true that up until the time of  
17 the hypothetical negotiation, this license would have  
18 been the largest license fee ever achieved by Open  
19 Market for these patents?

20 A I think that's right.

21 Q I -- I think this is clear, and I'm going to  
22 move through it very quickly. If I -- if I lose you,  
23 you tell me, and I'll slow down, all right?

24 A All right.

25 Q Soverain is not the one that originally

1 developed this technology. That's obvious, correct? It  
2 was the inventors at Open Market.

3 A That originally developed it, yes.

4 Q And let me see if I have this correct. You  
5 have acknowledged that Open Market went out of business  
6 by virtue of the acquisition by Divine.

7 A They -- they stayed in existence as a legal  
8 entity, but as a separate, standalone business, yes.

9 Q But not doing business, just as an entity; is  
10 that right?

11 A That's right.

12 Q So if we say that by virtue of the  
13 acquisition, Open Market went out of business, that  
14 would be true, wouldn't it?

15 It still existed as an entity, but it wasn't  
16 doing business, right?

17 A It wasn't doing business as a standalone, but  
18 its products and such were still being sold. That's the  
19 thing I'm struggling with.

20 Q Well, its products were being sold by Divine  
21 Technologies once the company was acquired; isn't that  
22 true?

23 A That is true.

24 Q You mentioned that Transact has been a  
25 profitable -- profitable product for Sovereign. Do you

1 remember Mr. Roth asking you about that?

2 A I do.

3 Q I'm going to ask you to turn to Exhibit 250 in  
4 your book there that I have before you, and tell me when  
5 you're there.

6 A I am.

7 Q Isn't it correct that this document reflects  
8 income and expense relating to Transact only?

9 A Yes.

10 Q And this document does not include expenses,  
11 such as salaries, does it?

12 A It does for the entire engineering team,  
13 anyone who works on Transact.

14 Q Do you recall at your deposition -- and I can  
15 show it to you, if you need me to -- at Page 136, where  
16 you said that this document does not include salaries  
17 and rent?

18 A It doesn't include my salary, and it doesn't  
19 include rent, you are correct.

20 Q And Soverain's salaries for personnel are  
21 around \$300,000 a year; is that right?

22 A Yes.

23 Q And rent is around \$60,000 a year; is that  
24 right?

25 A That is correct.

1 Q And there are other costs, such as telephone,  
2 accounting costs, and the like; isn't that true?

3 A That's true.

4 Q That are not shown here; isn't that correct?

5 A That's right.

6 Q And so at a minimum, you've indicated there  
7 are at least \$360,000 each year in expenses that are not  
8 shown on this sheet in salaries, rent. That's 360,  
9 right?

10 A That might be right. Those other --

11 Q Okay.

12 A Those other expenses are more corporate, but  
13 yes.

14 Q All right. You're not quibbling with me. I  
15 could show you on Page 136 and 138 of your deposition  
16 where you verified that.

17 You're not contesting that, are you?

18 A No, I'm not contesting it.

19 Q Okay.

20 A I'm just explaining it.

21 Q All right. So the numbers that are shown on  
22 the net income line for the Transact product that show  
23 positive numbers, those don't really represent take-home  
24 profit or put-it-in-the-bank money, do they?

25 A As we look at the Transact business, it does.

1           Q     Before expenses that I've covered with you; is  
2 that right?

3           A     There would be -- I guess there could be an  
4 allocation of a portion of the corporate expenses that  
5 could be added to this.

6           Q     All right. So it depends on how you allocate  
7 expenses, but if you allocate them one way, one could  
8 say that Transact has lost money every year; isn't that  
9 right?

10          A     It could. That's not how we account for it,  
11 but it could, yes.

12                     MR. SAYLES: May I approach the Bench,  
13 Your Honor?

14                     THE COURT: Yes, you may.

15                     (Bench conference.)

16                     MR. SAYLES: You asked that I approach  
17 the Bench before attempting to get into the purchase  
18 price for these patents-in-suit. And remember, the  
19 argument was it was purchased in bankruptcy.

20                     At this time, I would request that the  
21 Court allow me to prove from the contract the purchase  
22 price of the patents was \$590,000. And with respect to  
23 the bankruptcy aspect, I have two exhibits that shows  
24 the multiple bidders available.

25                     THE COURT: Shows what?

1 MR. SAYLES: Multiple bidders available  
2 for that bankruptcy auction. So I would submit that,  
3 therefore, I should be allowed to establish the purchase  
4 price.

5 MR. SATINE: Your Honor, we would renew  
6 the argument we did with respect to the MIL.

7 THE COURT: The what?

8 MR. SATINE: The motion in limine.  
9 Motion in Limine No. 1 that you granted.

10 One, the bankruptcy auction is two years  
11 past the date of the hypothetical, has no relevance to  
12 the hypothetical negotiation. Different party.  
13 Different party and it's after the hypothetical  
14 negotiation.

15 And, two, it's prejudicial under 403.

16 Three, it's highly prejudicial now after  
17 Ms. Wolanyk has testified about how the assets moved.  
18 It makes it appear as if she's been hiding something  
19 from the jury and trying to hide the fact it was a  
20 bankruptcy.

21 So it's not relevant. It's prejudicial,  
22 regardless. It was prejudicial before. It's more  
23 prejudicial now.

24 THE COURT: Counsel?

25 MR. SAYLES: Yes, sir.

1 THE COURT: What's the jury going to  
2 think if this is two years after the hypothetical  
3 negotiation?

4 MR. SAYLES: My response to that is -- my  
5 response to that is that it still goes to the value of  
6 the patents at the time of the hypothetical negotiation,  
7 because licenses and other indications of value provided  
8 at the hypothetical negotiation are sometimes permitted.

9 THE COURT: Well, if I let that in, do  
10 you want me to let in what Amazon paid them?

11 MR. SAYLES: No, I don't.

12 THE COURT: Then I wouldn't offer that,  
13 if I were you, because if I let that in, I'm going to  
14 let the Amazon stuff in, if they want to put it in.

15 What's good for the goose is good for the  
16 gander.

17 If you're going to get into this stuff  
18 after it and they want to, y'all have at it; but just  
19 realize you're not going to get half of it. You're  
20 going to get the whole thing.

21 MR. SAYLES: Okay. Would you give me  
22 just a moment to confer with my client on that issue?

23 THE COURT: We'll go ahead and take our  
24 break at this time.

25 MR. SAYLES: Okay.



1 (Bench conference concluded.)

2 THE COURT: Ladies and Gentlemen of the  
3 Jury, we're going to go ahead and take our afternoon  
4 break at this time. We'll be in recess until 2:40.

5 Please remember my instructions.

6 COURT SECURITY OFFICER: All rise.

7 (Jury out.)

8 (Recess.)

9

10 (Jury out.)

11 THE COURT: Mr. Sayles, did you come to a  
12 conclusion whether you want to pursue that line of  
13 questioning?

14 MR. SAYLES: No, Your Honor, I do not  
15 want to pursue that. I might have another question or  
16 two.

17 THE COURT: Bring the jury in, please.

18 COURT SECURITY OFFICER: All rise for the  
19 jury.

20 MR. ADAMO: I guess I don't get Christmas  
21 early this year, Judge.

22 (Jury in.)

23 THE COURT: Please be seated.

24 MR. SAYLES: May it please the Court.

25 THE COURT: All right. Mr. Sayles, you

1 may proceed.

2 Q (By Mr. Sayles) Ms. Wolanyk, just another  
3 minute or so.

4 A Okay.

5 Q Have you done your best to give me your best  
6 and most honest answers?

7 A I have.

8 Q And when you told me that predominantly the  
9 license agreements prior to the hypothetical negotiation  
10 were of the lump sum variety, that's the way it was,  
11 isn't it?

12 A Of the ones I'm recalling, yes.

13 Q Yes. And in this case I need to ask you this:  
14 In addition to being the chief executive officer of  
15 Soverain, you also have an ownership interest in the  
16 company, don't you?

17 A I do.

18 Q And to some extent, your bonus or compensation  
19 could be related to the outcome in this case; isn't that  
20 right?

21 A That's -- that's correct.

22 Q Okay.

23 MR. SAYLES: Pass the witness.

24 THE COURT: All right. Redirect.

25 REDIRECT EXAMINATION

1 BY MR. ROTH:

2 Q Ms. Wolanyk, how much -- what percentage of  
3 the stock in Sovereign do you own?

4 A Five percent.

5 Q And how did you earn your equity interest of  
6 five percent?

7 A I worked for a year without a salary.

8 Q So your first year you agreed with the  
9 investors that you wouldn't get paid a salary, and in  
10 exchange at the end of the year they would give you five  
11 percent of the company?

12 A That's right. We were a startup.

13 Q Yeah. All right.

14 Now, if anyone got the impression from the  
15 questions or the way Mr. Sayles phrased his question  
16 about Divine bought Open Market and 15 months later it  
17 went broke, Open Market had nothing to do with the  
18 demise of Divine, did it?

19 A I think actually Open Market was one of  
20 Divine's success stories. It was just a bigger, much  
21 bigger problem.

22 Q So Open Market was one of the good purchases  
23 they made?

24 A It was the best, I thought.

25 Q And, if anything, Divine took down Open

1 Market, not vice versa?

2 A It could be argued, yes.

3 Q All right. Now, you were asked a question  
4 about the Johnson & Johnson agreement.

5 MR. ROTH: Is that 223, I think? Would  
6 you bring that up, please?

7 Q (By Mr. Roth) We put that up there, and  
8 Mr. Sayles asked you about the license fee being -- I  
9 believe it was a hundred thousand dollars, wasn't it?  
10 It's on the second page where he --

11 MR. ROTH: Pull up the second page.

12 A Yes.

13 Q (By Mr. Roth) He read this part to you, I  
14 think, where they -- they Johnson & Johnson paid a  
15 hundred dollars for this license to the patent?

16 A Yes.

17 Q And actually it was to one patent, wasn't it?

18 A That's correct.

19 Q Only one patent?

20 A Only one patent.

21 Q Second thing is -- is that he read to you  
22 about, it was the granted clause -- which if you will go  
23 up, I believe it's up underneath here -- by granting a  
24 worldwide license. A worldwide paid-up license to make  
25 and have made and use licensed products in and for the

1 field of use.

2 Do you see that language?

3 A I do.

4 Q Field of use. All right.

5 MR. ROTH: Let's go back, if you would,  
6 to the first page. Let's see what this really involves.

7 If you would, you blow up the background,  
8 then this part right here starting with licensee.

9 Q (By Mr. Roth) The licensee is a worldwide  
10 company that operates various intranet and internet  
11 sites for its internal business purposes.

12 See that?

13 A I do.

14 Q What's that mean? What's an intranet?

15 A An intranet typically is a website that's  
16 accessible only to employees of a company inside the  
17 company.

18 Q It's a private network within the company?

19 A Right.

20 Q Is that right?

21 A That's correct.

22 Q Not accessible to people outside the employees  
23 of the company?

24 A Correct.

25 Q So -- and accordingly -- the next sentence:

1           Accordingly, the licensee desires a license  
2 for the licensed products as defined below in and for  
3 the field of use, the field of use, defined below.

4           Then it defines field of use to be what? See  
5 that next clause?

6           A     I do. Would you like me to read it?

7           Q     Yes. Just read the first sentence there.

8           A     The development and operation of intranet and  
9 internet websites by licensee, solely for licensee's  
10 internal business purposes.

11          Q     All right. So this isn't a license to the  
12 patents for anything but a very limited purpose; is that  
13 correct?

14          A     That's correct, and just for one patent.

15          Q     For one patent only for internal use, not for  
16 the internet, not for selling goods on the internet; is  
17 that right?

18          A     That's correct.

19          Q     Okay. That's not anything like the type of  
20 license that would be required to license all of the  
21 patents-in-suit to run a website like Newegg runs?

22          A     That's correct.

23          Q     Farthest thing from being similar, isn't it?

24          A     Very, very different things.

25          Q     Now, you were asked -- and I think it was 250

1 was the other exhibit.

2 MR. ROTH: If you could, would you bring  
3 that up. Blow that up where we can see it. We never  
4 did get to see it.

5 Q (By Mr. Roth) This was an exhibit you were  
6 shown on cross-examination. And can you tell the jury  
7 what that is?

8 A This is the -- the income statement for just  
9 the Transact software business.

10 Q All right. And that's the actually part of a  
11 larger document that was produced and that they talked  
12 to you about at your deposition; wasn't it?

13 A That's correct.

14 Q And it was all the financial statements for  
15 these periods?

16 A That's correct.

17 Q All right. This is a page, according to  
18 your -- the way you do your corporate accounting, where  
19 you list your total revenue that's related strictly to  
20 Transact software; is that right?

21 A Yes.

22 Q And the total expenses that are listed are  
23 what expenses?

24 A They're all the expenses that are directly  
25 attributable to the Transact business.

1 Q So that's the software engineers?

2 A Yes.

3 Q That's the people that work on the project;  
4 that would be the consulting fees that you might have  
5 paid in any given year?

6 A Correct. Any marketing fees that are specific  
7 to Transact, anything of that nature.

8 Q Okay. Now, the consolidated statement that  
9 this was a part of would show the information for that  
10 same period of time that considers all of your expenses?

11 A Correct.

12 Q And all of your income?

13 A Correct.

14 Q Your licensing, royalty income; is that right?

15 A Right.

16 Q It would also include your attorney's fees,  
17 your expenses?

18 A Correct.

19 Q Your office overhead?

20 A The corporate overhead.

21 Q Everything?

22 A Yes.

23 Q The consolidated statement, if we were looking  
24 at that, does that reflect that, on behalf of your  
25 investors and five percent for yourself, you have made



1 money in your operations of the Soverain software  
2 business?

3 A Well, there are expenses involved with  
4 litigation, and so there are years where we don't. But  
5 on average, for our entire existence, we have overall  
6 been several million dollars in profitability.

7 Q You've averaged several million dollars a year  
8 on the average --

9 A Right, a year.

10 Q -- since you took it over?

11 A Correct. On average.

12 MR. ROTH: We'll pass the witness, Your  
13 Honor.

14 THE COURT: All right. Recross.

15 RECROSS-EXAMINATION

16 BY MR. SAYLES:

17 Q Ms. Wolanyk, you were in the courtroom when  
18 you heard the '780 patent is sort of the parent of the  
19 patents-in-suit, weren't you?

20 A It's the -- of one of the patents, the '639,  
21 yes.

22 Q That's right. And, in fact, it's even up here  
23 in the box; isn't that right?

24 A It is, for that reason.

25 Q And if we go to Exhibit 223, Paragraph 1(c)

1 down at the bottom, 1(c).

2 A Yes.

3 Q It says there that the licensed patents means  
4 U.S. patent '780, including divisionals, continuations,  
5 and reissues, and all foreign counterparts; is that  
6 right?

7 A That's correct.

8 Q So the way license agreements are known and  
9 understood, this license agreement actually did cover  
10 more than the '780 patent, didn't it?

11 A I was referring of the patents-in-suit, it  
12 covers one of the patents-in-suit, the '639 patent.

13 MR. SAYLES: Pass the witness.

14 THE COURT: Anything further?

15 MR. ROTH: No further questions, Your  
16 Honor.

17 THE COURT: All right. You may step  
18 down. Thank you.

19 Who will be your next witness, Mr. Adamo?

20 MR. ADAMO: Your Honor, our next and last  
21 witness will be Mr. Jim Nawrocki, our damages expert.

22 And with the Court's permission,  
23 Mr. Satine will handle that examination.

24 THE COURT: Very well. Mr. Nawrocki.

25 How long do you anticipate this witness

1 will take, Mr. Nawrocki?

2 MR. SATINE: Approximately one hour, Your  
3 Honor.

4 THE COURT: One hour, very well.

5 MR. ADAMO: Our expectation, Your Honor,  
6 is that we are hoping we may rest before the end of the  
7 day.

8 THE COURT: I hope so, too.

9 MR. ADAMO: That's up to my other  
10 sparring counsel here, sir.

11 THE COURT: Thank you.

12 Mr. Sayles, there is a chance they may  
13 rest this afternoon. If they do, will you be prepared  
14 to go forward?

15 MR. SAYLES: Yes, we will.

16 THE COURT: Very well.

17 MR. SATINE: With the Court's permission.

18 THE COURT: You may proceed.

19 JAMES NAWROCKI, PLAINTIFF'S WITNESS, SWORN

20 DIRECT EXAMINATION

21 BY MR. SATINE:

22 Q Mr. Nawrocki, would you please introduce  
23 yourself to the Ladies and Gentlemen of the Jury by  
24 telling them who you work for and what you do?

25 A My name is James Nawrocki, and I'm president

1 of IPFC Corp. IPFC Corp is located in Houston. We also  
2 have an office in Austin. And I provide financial  
3 consulting services.

4 Q What kind of financial consulting services  
5 does IPFC Corp provide?

6 A We provide financial consulting service mostly  
7 in the areas of intellectual property. Intellectual  
8 property such as patents, trademarks, and copyrights.

9 And that would involve valuations, assistance  
10 with companies on licensing, as well as damage analysis.

11 Q How many years of experience do you have in  
12 this area?

13 A I've worked in the area of financial  
14 consulting and intellectual property matters since '82.  
15 So more than 25 years.

16 Q And can you please tell the jury how you got  
17 into this area of work?

18 A Yes. I actually started -- I'm a CPA, and I  
19 started doing work in accounting and auditing with a  
20 large CPA firm. And as part of that work, occasionally  
21 we'd have requests for assisting companies that were  
22 involved in intellectual property matters.

23 And so the first case I was involved in was  
24 back in the early '80s, and one case led to another. So  
25 now I spend the majority of my time in the area of

1 intellectual property valuations.

2 Q Now, you've prepared some demonstratives to  
3 help us move efficiently through your testimony because  
4 we have a lot of material to work through. So let's put  
5 the first one up on the screen, and you should be seeing  
6 a copy on your screen once we get it there.

7 Mr. Nawrocki, what are we seeing on the left  
8 side of the screen and what are we seeing on the right  
9 side of the screen?

10 A Okay. So this is a -- what's called a  
11 curriculum vitae or a CV. It's my background. The left  
12 side is the front page of my background. You will see  
13 my logo, the IPFC logo up in the upper left-hand corner.

14 And on the right side I've just highlighted  
15 several parts of my experience.

16 Q Okay. And have you ever served as an expert  
17 witness on damages analysis in a patent case?

18 A Yes, I have. I've been asked to serve on --  
19 as a damage expert in several cases. I'd say there's  
20 probably been more than a hundred cases I've been asked  
21 to render an opinion. Some of those cases have gone to  
22 trial, some have not.

23 Q Can you tell us about some of those patent  
24 cases in which you have served as an expert witness?

25 A The cases are involved in a lot of high-tech

1 areas. I've done some work for Texas Instruments here  
2 in Texas. Also worked for Yahoo!, the internet company.  
3 They had a dispute with Google involving search  
4 technology. They also had a case involving FindWhat, a  
5 smaller search company. So I worked on behalf of them  
6 in terms of their search technology in a patent  
7 infringement matter.

8 I've also worked on a case involving  
9 Microsoft's Internet Explorer product, the browser that  
10 we've heard some discussion of. I worked in evaluating  
11 the patents related to that.

12 I've also work for several universities; the  
13 University of California, as well as the University of  
14 Texas. Several universities have intellectual property  
15 departments. As part of their research they'll develop  
16 patents. And so I've worked with the University of  
17 Texas as well. The case with them involved hybrid  
18 batteries that are used in some of the hybrid cars and  
19 computers and things such as that.

20 Q And can you tell us about some of the courts  
21 in which you have testified in the past?

22 A I have testified in Texas in several of the  
23 courts. Over in Marshall, Lufkin, Houston, Austin,  
24 Dallas, so in several courts in Texas. As well as  
25 nationally, Delaware and various other jurisdictions

1 across the country.

2 Q Now, in this case you have been called as an  
3 expert witness by the Plaintiff, Soverain Software?

4 A That's correct.

5 Q When you testify as an expert, do you always  
6 testify as an expert for the plaintiff?

7 A No. I work for plaintiffs and as well --  
8 defendants as well.

9 Q How are you paid for your work as an expert?

10 A My firm is paid for our time based upon an  
11 hourly basis for my time, as well as the time of the  
12 people working with me.

13 Q Is the payment of work contingent on the  
14 outcome of the trial?

15 A No, it's not.

16 Q What have you been asked to do in this case?

17 A What I've been asked to do in this case is  
18 review the financial information that's been produced by  
19 the parties, do my own research of any publicly  
20 available information, review deposition testimony.

21 I've been here in court to hear the testimony  
22 as well. As well as render an opinion in terms of what  
23 the damages are as a result of the alleged infringement  
24 by Newegg.

25 Q Do you have an opinion as to the reasonable

1 royalty damages to which Soverain is entitled due to  
2 Newegg's infringement of the patents-in-suit?

3 A Yes, I do.

4 MR. SATINE: Let's go to the next  
5 demonstrative, please.

6 Q (By Mr. Satine) What are we looking at here?

7 A So this is taken from the U.S. Code. It's a  
8 statute -- part of the statute for remedies for patent  
9 infringement. So when there's patent infringement, the  
10 Code provides some overall guidance.

11 It states that: Upon finding for the  
12 claimant, the Court shall award the claimant damages  
13 adequate to compensate for the infringement, but in no  
14 event less than a reasonable royalty -- so reasonable  
15 royalty represents a floor level of damages -- for the  
16 use made of the invention by the infringer.

17 So this provides the overall guidance from a  
18 damages determination that I used as part of my  
19 analysis.

20 Q Okay. The jury has heard a bit about  
21 royalties and comparisons to things. Do you have a  
22 slide on royalties? It's the next one.

23 MR. SATINE: Can you put that up?

24 Q (By Mr. Satine) If you could you walk us  
25 through this?



1           A     Yes. I think this has been used in a couple  
2 of different examples in terms of talking about what a  
3 royalty is. And we're all used to paying rent on a  
4 house or rent on, you know, a car or something like  
5 that. So when you have a house, there's a landlord and  
6 a tenant. They enter into a relationship, and it's  
7 usually a lease agreement, and that will be a payment  
8 that would be in terms of rent is what it would  
9 typically be.

10                 Intellectual property is like a patent or a  
11 trademark, something like that. Here we've got a  
12 patent. The relationship there is a licensor, who owns  
13 the patent, and then a licensee, he's who is going to  
14 seek to use the patent. They enter into a license  
15 agreement, and a royalty is paid for that.

16                 So the royalty represents, basically, a rent  
17 for that patent. You don't own the patent, but you're  
18 paying a rent for your use of the patent.

19           Q     As an expert, how do you go about deciding  
20 what is a reasonable royalty to be paid by someone who  
21 infringes a patent owner's rights?

22           A     Well, there's several things. There is the  
23 component of what's the royalty base; that's one  
24 component. The other thing is determining what the  
25 royalty rate is that you applied to that. And we will

1 be talking about that in a second.

2           The royalty rate is determined based upon a  
3 review of some factors called Georgia-Pacific Factors.  
4 There's 15 factors that came out of a decision about,  
5 oh, back in the '70s that cited 15 factors. And that's  
6 one of the considerations that I've made in determining  
7 the royalty rate in this case, or royalty amount in this  
8 case.

9           Q     You did a Georgia-Pacific analysis in this  
10 case?

11          A     That is correct.

12                   MR. SATINE: If we can please have the  
13 next slide. Let's go back. I'm sorry. I'm getting  
14 ahead of myself.

15          Q     (By Mr. Satine) What information did you  
16 review and consider as part of your Georgia-Pacific  
17 analysis?

18          A     Well, as I mentioned, there was various  
19 information produced by Newegg, as well as by Soverain.  
20 Open Market/Divine produced various information as well.  
21 I looked at public information, went to the Newegg  
22 website, and looked at -- did industry research as well  
23 in terms of internet companies, their sales on the  
24 internet.

25                   Looked at public filings for Newegg. Read

1 various depositions, technical reports, other expert  
2 reports. Had discussions with Mr. Grimes -- or Dr.  
3 Grimes, I should say -- and Ms. Wolanyk. So I've done a  
4 very complete analysis of information as well as  
5 discussions.

6 Q One more thing before we get to your opinion  
7 in this case. Did you make any assumptions for purposes  
8 of reaching that opinion?

9 A Yes. The overall assumptions I made were that  
10 the patents at issue are valid, they're enforceable, and  
11 they are infringed by Newegg. As part of a damage  
12 context, that's what the law provides, that we need to  
13 make the assumption of validity, infringement, and  
14 enforceability in order to provide the context of the  
15 damages.

16 Q So the law requires you to make those  
17 assumptions?

18 A That's right, within the context of a damage  
19 analysis.

20 Q Now, I believe you have a demonstrative which  
21 summarizes your opinion as to the royalty damages to  
22 which Soverain is entitled, and that's up on the screen.  
23 And we can also put one on the easel, because I think  
24 we're going to keep coming back to this while we put  
25 other things on the screen today.

1 MR. SATINE: Thank you.

2 Q (By Mr. Satine) Mr. Nawrocki, can you walk us  
3 through this slide?

4 A Yes. This is the summary of royalty damages  
5 that I've calculated based upon my analysis. This chart  
6 summarizes that calculation.

7 On the left column you'll see the patents at  
8 issue, the '314 patent and the '492 patents. And then  
9 below that you will see the '639 patent. The '314 and  
10 the '492 relate to the online sales system. And then  
11 the '639 the session management patent. They've been  
12 talked about quite extensively here.

13 The next column shows the royalty base. The  
14 royalty base is over 28 million transactions. That is  
15 shown in transactions -- it doesn't represent -- it's  
16 not shown that way in this chart, but I think on the  
17 overhead, at least on my document, shows transactions.

18 And that's what it represents.

19 Q You are correct. The one up on the screen  
20 says transactions and the base and per transaction on  
21 the royalty rate. And it's on the board. I apologize  
22 for that.

23 A It represents transactions. So it's  
24 28,316,504 transactions that are within the damages  
25 base. And those are Newegg's completed transactions.

1 To that I applied the royalty rate of 80 cents for the  
2 '314 and '492 patents -- and that's if either or both  
3 patents are found infringed and valid, as well as  
4 enforceable -- to arrive at the total of 22,653,203.

5 Then the same approach I used for the '639,  
6 using a different royalty rate. So for the '639, the  
7 same amount of completed transactions times the 40 cents  
8 per transaction to arrive at 11,362,602.

9 The grand total of damages, based upon the  
10 extent of that infringement, the extent of those  
11 transactions, is 33,979,805.

12 Q I would like to start by talking about the  
13 royalty base. The number 28,316,504 appears two times.

14 Why do we see it two times?

15 A Because the patents -- there is two different  
16 sets of patents, as I mentioned. One is for the online  
17 sales system; the other is for the session management.

18 And the same amount of transaction applied the  
19 both. The same amount of transaction is accused of  
20 infringing both patents.

21 Q Why is the royalty base the number of  
22 transactions?

23 A That -- as we talked about earlier, we wanted  
24 to look at the extent of use, or the use made of the  
25 invention. I'm not sure if we had a few -- if you could

1 just go back, maybe go back a couple of charts, if you  
2 would. One more. Yes.

3 So if you look at the bottom line for use made  
4 in the invention by the infringer, that use made was a  
5 lot of transactions, over 28 million transactions.  
6 That's what that represents.

7 Okay. You can go back.

8 Q And you have some slides about use.

9 MR. SATINE: Let's go to the next slide  
10 after this one.

11 Q (By Mr. Satine) This is entitled During  
12 Infringement Period. Can you explain that to us?

13 A Yes. So what I've shown on this chart is  
14 Newegg's extent of use during the infringement period.  
15 There was some discussion a little bit earlier about the  
16 hypothetical negotiation, which we will talk about in a  
17 second here, starting in early 2001.

18 So this shows their completed online sales  
19 transactions -- that's Newegg's completed online sales  
20 transactions -- from '01 all the way through 2010. I've  
21 estimated it through April of 2010. I think they  
22 provided us information through March. I estimated it  
23 through April 30th, basically at the end of this trial.

24 Q Where did you get this information that we're  
25 seeing on this chart?

1           A     This came from information that was provided  
2 by Newegg. Newegg produced various spreadsheets that  
3 contained their completed transactions. That's where  
4 this information came from.

5           Q     Why does the infringement period begin in  
6 2001?

7           A     Well, because that's when they were first  
8 accused of infringing -- that coincides with their first  
9 accused infringement, I should say. That coincides with  
10 their first accused infringement.

11                   The damages period is a little bit less than  
12 that. We'll be talking about that in a second.

13          Q     Why is the number of completed online sales  
14 transactions during the infringement period larger than  
15 the royalty base on the summary of royalty damages  
16 chart?

17          A     All right. So the 54.7 million on the chart  
18 above is higher than the 28.3 million. And, again,  
19 that's because the chart on your overhead, the 54  
20 million, shows all the completed transactions. However,  
21 Soverain is only seeking damages from the filing of the  
22 suit in November of '07.

23                   MR. SATINE: Let's go to the next chart.

24          Q     (By Mr. Satine) And what do you mean by  
25 Newegg's extent of use at the top of this chart?

1           A     Well, this is the similar information that I  
2     just showed; it's just that it shows it in a bar chart.  
3     It's the same information. The blue bars that you see  
4     there, that represents the 28.3 million that I show on  
5     the large chart here in court.

6                 So if you add up all those blue bars from 2007  
7     to 2010, that's 28.3 million. In fact, I put that on  
8     the top portion of the chart there.

9                 The gray areas, those are areas that they're  
10    still accused of infringing, but I have not been asked  
11    to calculate damages for that period.

12                As I understand, Soverain is only seeking  
13    damages from the filing of suit in November of '07. So  
14    that's why that '07 bar is just the very tip of it.

15            Q     Okay. I want to be clear on this. The gray  
16    parts that we're seeing up there, the gray bars, are  
17    they included in the royalty base?

18            A     No, they're not.

19            Q     What is the relevance, if any, of the  
20    pre-November 2007 transactions?

21            A     The pre-November 2007?

22            Q     The gray bars?

23            A     The gray bars? It shows the extent of  
24    infringing use. So these were still accused of  
25    infringement; but, again, for damages purposes, we're



1 just calculating it for the blue bars.

2 Q Okay.

3 MR. SATINE: Let's look at your next  
4 slide.

5 Q (By Mr. Satine) This one says During the  
6 Damages Period. Can you explain this one to us?

7 A Right. So this one is -- this is the support  
8 for the calculation of the 28.3 million. It shows it on  
9 an annual basis from November '07 through April 30th of  
10 2010.

11 Q Just so we're clear, why is the number for  
12 2007 and the number for 2010 so much smaller than the  
13 numbers for 2008, 2009?

14 A Because '07 -- 2007 and 2010, those are just  
15 partial years. November through December for '07, and  
16 then just January through April of 2010. It might be  
17 worth putting the numbers on the record, I guess, if you  
18 would like. 1.7 million completed transactions in '07.  
19 I will say 1,757,278. Then for 2008, 10,571,583. 2009  
20 would be 12,046,351. And then for 2010 it's 3,941,292.  
21 For a total of 28,316,504, which is the same on the  
22 damages chart that we have.

23 Q Mr. Nawrocki, I'm going to ask you to keep  
24 your voice up just a little bit.

25 A Okay.

1                   MR. ROTH: Ask him to move the microphone  
2 closer. When he looks away, we can't hear you at all.

3                   THE WITNESS: What about if I turn it  
4 this way?

5                   MR. ROTH: We're having a lot of trouble  
6 getting the right distance from it.

7           Q        (By Mr. Satine) Okay. We've now talked about  
8 the royalty base, so let's turn to the royalty rates.  
9 You have two royalty rates, 80 cents and 40 cents. What  
10 kind of analysis did you do to determine those rates?

11          A        As I mentioned, I looked at the  
12 Georgia-Pacific Factors, which have been identified in a  
13 prior case. What we have on the overhead here is a list  
14 of those factors. It comes from a case called  
15 Georgia-Pacific versus U.S. Plywood.

16                   And that was a case -- the case went on in the  
17 '60s, but the decision -- one of the decisions that  
18 listed out these factors was in 1970. So, it's been  
19 around for 40 years now. And it lists out 15 factors,  
20 and those are shown on the right side there.

21          Q        Okay. And we have -- you prepared this slide,  
22 which is easier to look at than trying to work through  
23 those 15 factors as written by the Court.

24                   MR. SATINE: Which we'd have to go up.  
25 There we go.

1           Q     (By Mr. Satine) And what's the purpose of this  
2 slide, if you could just tell us that?

3           A     So this slide is a summary of those factors.  
4 And I have put them into several groups for discussion  
5 here today. So this relates to the 15 factors. It's  
6 adapted from the Georgia-Pacific case. I have put them  
7 in several different groups.

8                     The numbers that are shown on here coincide  
9 with the numbers that were in the Georgia-Pacific case.  
10 So I put them in groups of licensing factors, financial  
11 and business factors, technical factors, and then other  
12 considerations as well.

13          Q     Okay. Now, we've heard a bit about  
14 hypothetical negotiations. That's factor No. 15 over  
15 there on the right. Why don't we start with that.  
16 First of all, what is a hypothetical negotiation?

17          A     There's been some discussion about a  
18 hypothetical negotiation. And in a damages context,  
19 what that refers to is that, because the parties haven't  
20 agreed for a license in the real world, we have to go  
21 back and do a hypothetical negotiation as one of the  
22 factors. Go back in time, the time of the first  
23 infringement, and determine what the parties would have  
24 agreed to between a licensor and a licensee as a  
25 business proposition. So that's what that refers to.

1           Q     Is a hypothetical negotiation the same thing  
2 as a settlement negotiation?

3           A     No, it's not. Because the parties haven't  
4 settled the case and worked out a license, you've  
5 basically got to do this hypothetical construct. It's  
6 quite a bit different.

7           Q     What if the parties of this hypothetical  
8 negotiation cannot come to an agreement?

9           A     That's the difference. In a real world  
10 negotiation, one of the parties sometimes says, I'm not  
11 going to take a license, you know, I'm not going to do  
12 it.

13                     In a hypothetical negotiation, you have to  
14 work out an agreement in terms of what makes sense based  
15 upon the use that's at issue, based upon the parties'  
16 position at that time.

17           Q     Tell us about the hypothetical negotiation in  
18 this case. Who's there, what are they thinking, what's  
19 going on?

20           A     So we've heard some discussion about it, but  
21 let me try the put in it context here.

22                     So what we have is we have Open Market, who's  
23 at one side of the table, and Newegg is on the other  
24 side. This is basically in late 2000, early 2001. I  
25 understand that Newegg introduced this website with the

1 accused technology in early 2001.

2           So what's the situation for Open Market? Open  
3 Market had had thousands of licensees in the past.  
4 We've heard that during the years they had tremendous  
5 success, and then they started decreasing.

6           So at this point in time Open Market, had  
7 already licensed, I think, over 10,000 licensees. They  
8 had licensed several large companies that you heard  
9 discussion about. They had a market share that  
10 approached 30 percent compared to Microsoft and IBM. So  
11 their technology was being used. There was some  
12 discussion about their Transact software and how  
13 successful that was at that time.

14           So that presents one side of the fence.  
15 Newegg had used -- I'm sorry, Open Market had used  
16 several different licensing scenarios for themselves,  
17 including licensing software sometimes. They also had  
18 some per-transaction-type licenses they did as well.

19           On the other side is Newegg. As was  
20 mentioned, they were starting on this new venture into  
21 selling products on the internet. As I understand it,  
22 they were making computers and trying to make computers,  
23 but now they were going to jump into the internet and  
24 would need technology to facilitate this.

25           So they would be anxious to obtain technology

1 that they were allowed the use on their business plan  
2 and their business venture to be able to have an  
3 efficient process for their customers. So they would be  
4 anxious for the technology.

5 Open Market would realize they had valued  
6 patents. The patents had already issued. So that would  
7 be the construct of the negotiation at that time.

8 Q At this hypothetical negotiation, what  
9 information do each of the parties have about the other  
10 party?

11 A It's been called a card dealt face-up. So  
12 it's like you're playing Texas Hold'em, and all the  
13 cards -- everybody's cards are dealt face-up. So  
14 everybody knows the other party's information. In the  
15 real world that doesn't happen. Some parties might keep  
16 certain information to themselves.

17 But in this construct, you basically say  
18 there's no hiding any information; everything is dealt  
19 face-up.

20 Q Okay. So we have this hypothetical  
21 negotiation, Open Market, Newegg, cards are face-up.

22 Okay. Then we have other factors to look at.  
23 So let's start with the licensing factors.

24 MR. SATINE: Let's go to the next slide  
25 that you have.

1 Q (By Mr. Satine) Okay. Now, explain the first  
2 bullet point on this slide.

3 A So this provides a summary of the different  
4 licensing factors and the points related to those.

5 So, for the first one in 1998, this is a  
6 couple of years before the hypothetical, Open Market  
7 began encouraging companies to voluntarily take licenses  
8 to its newly-issued patents.

9 I think earlier there was a Wall Street  
10 Journal article talking about the fact that they had  
11 just received the patents. And they sought to receive  
12 licensees for their patent. They invited people to seek  
13 a license.

14 Q Okay. Now, we've been hearing about the  
15 Johnson & Johnson agreement. So if you could turn to  
16 Exhibit P-185 in your binder which is up there in front  
17 of you.

18 MR. SATINE: And if we could put that  
19 cover of that agreement on the screen.

20 Q (By Mr. Satine) This is the one that  
21 Ms. Wolanyk was discussing with counsel just a little  
22 while ago. If we look at the bottom of the first page  
23 of the license agreement, I think it's Paragraph 1(c),  
24 does it tell us which patents Open Market licensed to  
25 Johnson & Johnson?

1           A     Yes. At the bottom section there, (c), you  
2 will see that the licensed patent that's part of this  
3 agreement referred to that, what's called the '780  
4 patent, including divisionals, continuations, and  
5 reissues and foreign counterparts.

6                     As I understand it, the '780 was the  
7 predecessor to the '639.

8           Q     Does the license that was given to Johnson &  
9 Johnson by Open Market include a license to practice the  
10 '314 patent?

11          A     No, not to my knowledge.

12          Q     So does the license that was given by Open  
13 Market to Johnson & Johnson include a license to the  
14 '492 patent?

15          A     Not to my knowledge.

16          Q     And, by the way, was this the Johnson &  
17 Johnson or some subsidiary of Johnson & Johnson?

18          A     It was a subsidiary of Johnson & Johnson. If  
19 you look at the very top portion --

20                     THE WITNESS: Maybe you can blow that top  
21 portion up.

22          A     -- it mentions Johnson & Johnson Vision  
23 Care.

24                     THE WITNESS: If you can highlight that.

25          A     They are located in Florida. Whereas, Johnson



1 & Johnson corporate is located up in the northeast. But  
2 this would be their vision care subsidiary presumably.

3 Q Now, Mr. Roth and Ms. Wolanyk talked about the  
4 fact that this was a hundred thousand dollar payment.

5 Mr. Nawrocki, if Johnson & Johnson paid a  
6 hundred thousand dollars for a license to use the '780  
7 patent, why don't we simply stop the testimony right  
8 there and say, Newegg shouldn't have to pay any more  
9 than that?

10 A Well, this is for a whole different type of  
11 use, as was talked about. This is for internal use for  
12 Johnson & Johnson. As we know, Newegg has been selling  
13 computers, electronics on the internet to consumers.  
14 This is for internal use for Johnson & Johnson, and it  
15 specifically refers to that within the context.

16 So it doesn't show what the volume of the  
17 transactions were, or if there were any transactions. I  
18 assume there weren't. These are internal transfers  
19 using the session management patent. But, to my  
20 knowledge, there's no third-party transaction that would  
21 be anywhere close to the 28 million they are talking  
22 about here. In fact, I think they are specifically  
23 prohibited.

24 Q Taking into consideration the hundred thousand  
25 dollars that Johnson & Johnson Vision Care paid to Open

1 Market, do you still think that you've shown the jury  
2 what is a reasonable royalty in this case?

3 A Yes. The 33 million that I have calculated,  
4 33.9 million, is still an appropriate calculation. The  
5 hundred thousand is something I considered. But once I  
6 read the agreement, I realized that it was for internal  
7 use, and it was not for third-party use such as the  
8 transactions that Newegg has had.

9 Q Let's go back to the slide with your bullet  
10 points on licensing factors. Let's go to the second  
11 bullet point.

12 Tell us about that.

13 A Yes. The second bullet point is that in early  
14 2001 -- so this is after the hypothetical -- Open Market  
15 began to enforce its patent rights against Intershop.  
16 Intershop was a competitive company. It sold software  
17 as well. It wasn't like Newegg that's selling products.  
18 They were selling software as well.

19 So Open Market realized that and began  
20 enforcing their rights against Intershop.

21 Q When you say began enforcing their rights  
22 against Intershop, what does that mean?

23 A I think what Ms. Wolanyk mentioned is they  
24 filed suit against Intershop in early 2001.

25 Q They filed a patent infringement suit?

1           A     That's correct.

2           Q     And did Open Market and Intershop settle that  
3 lawsuit?

4           A     Yes, that's my understanding.

5           Q     As a result of the settlement of that lawsuit,  
6 did Open Market and Intershop enter into a patent  
7 license agreement?

8           A     That's my understanding.

9           Q     Okay. Well, the attorneys have agreed not to  
10 discuss the terms of any license agreement that resulted  
11 from the settlement of a lawsuit. So we're going to  
12 move to your third bullet point.

13                   MR. SAYLES: Excuse me, Your Honor. I'm  
14 going to object to the sidebar remark of counsel there  
15 and ask the Court to instruct the jury to disregard  
16 that. That was improper.

17                   THE COURT: All right. Restate your  
18 question, Counsel.

19           Q     (By Mr. Satine) Mr. Nawrocki, if you could  
20 just move to the third bullet point on that chart and  
21 please explain that to us.

22           A     Yes. The third bullet point talks about the  
23 fact that Open Market, who we've been talking about,  
24 Divine, who acquired the patents from Open Market, and  
25 then Sovereign had licensed one or more of the patents at

1 issue in this case more than 40 times. These patents  
2 have been licensed more than 40 times, including several  
3 large internet retailers.

4 There's a bunch of licenses to some small  
5 companies; there was also some licenses to some large  
6 companies. The large internet retailers included  
7 amazon.com as well as The Gap.

8 Q Well, we've talked about patent licenses that  
9 were granted by Open Market. So let's talk about some  
10 of the Divine licenses, and the jury has heard about  
11 some of those.

12 In doing your Georgia-Pacific analysis, did  
13 you review the patent licenses that were granted by  
14 Divine with respect to the patents-in-suit?

15 A Yes, I did.

16 Q Okay. If we could turn -- if you could turn  
17 to Exhibit P-194 in your binder.

18 MR. SATINE: And we are going to put the  
19 cover page of that up on the screen.

20 Q (By Mr. Satine) And P-194 is the license  
21 agreement between Divine and Katco Industries, Inc. Do  
22 you have that in front of you?

23 A Yes, I do.

24 Q And if we could all turn to Page 2 and look at  
25 Paragraph 7.

1                   MR. SATINE: If we can expand that on the  
2 screen.

3           Q       (By Mr. Satine) Do we see how much money Katco  
4 Industries paid to Divine for this patent license?

5           A       Yes. It says here under Section 7 that Katco  
6 paid a one-time payment of \$1,000. It's a fairly small  
7 payment, which represents -- the licensee represents, so  
8 Katco represents at least 10 percent of gross profit of  
9 sales of product over the internet. So as shown here,  
10 Katco was a fairly small company and user of the  
11 technology.

12          Q       So -- just so -- make sure I did my math  
13 right. If Katco paid \$1,000, which was at least 10  
14 percent of gross profit of sales of the product over the  
15 internet, that means Katco's gross profit of sales of  
16 product over the internet was no more than \$10,000?

17          A       That's correct.

18          Q       Mr. Nawrocki, if Katco paid \$1,000 for this  
19 patent license, how can close to \$34 million be a  
20 reasonable royalty in this lawsuit?

21          A       Because of the difference in use made. We  
22 talked about the use made there being fairly  
23 insignificant. Here we're talking about a lot higher  
24 volume of sales, as well as transactions.

25          Q       If you could turn to another of the Divine

1 licenses which is in your book. It's Exhibit P-199.

2 And, again, we're going to put the cover page up on the  
3 screen, so we can all look with you.

4 MR. SATINE: And if you would blow that  
5 first paragraph up.

6 Q (By Mr. Satine) This is an agreement between  
7 Divine and Odimo, Incorporated?

8 A That's correct.

9 Q Now, we're going to turn, if we can, to Page 2  
10 and look at Paragraph 7. I'd like to take a look at how  
11 much Odimo paid Divine for this patent license. Can you  
12 supply that for us?

13 A Sure. So within Paragraph 7 of this license,  
14 it shows that licensee, that's Odimo, shall pay to  
15 Divine the sum of \$30,000. And then it also says that  
16 it represents a royalty of approximately 85 cents per  
17 shopping cart transaction made last year on their  
18 websites.

19 Q And in the next sentence there, something in  
20 parenthesis. What does that refer to?

21 A Actually, within that context of that sentence  
22 it says that it's represented by the licensee, so Odimo  
23 said that they had approximately 35,000 transactions.

24 Q If Odimo paid Divine \$30,000, how can an  
25 amount close to \$34 million be a reasonable royalty in

1 this case?

2           A     All right. I know this has been discussed,  
3 and some of these things were shown in court earlier  
4 about these different bars on these different amounts.  
5 But if you take a look at it, it's \$30,000 for the  
6 35,000 transactions. As you can see, that's 85 cents a  
7 transaction.

8                     So what I've calculated here is 80 cents and  
9 40 cents a transaction. Due to the significant  
10 difference in volume, that represents the difference for  
11 the magnitude of the damages that are at issue in this  
12 case.

13                    Another way of looking at it, if you look at  
14 the number of transactions there, it's 35,000. Here you  
15 have 28 million. It's several hundred times more  
16 transactions at issue from Newegg, several hundred  
17 times -- I think it's 800 -- little bit more than 800  
18 times the amount.

19           Q     Let's look at just one more of the Divine  
20 licenses.

21                    If you could turn to Exhibit P-202 in your  
22 binder.

23                    MR. SATINE: Once again, please put the  
24 first page up for the rest of us to look at it.

25           A     The exhibit number again, Mr. Satine?

1 Q (By Mr. Satine) 202.

2 A Okay.

3 Q You have your copy?

4 A I have it.

5 Q And this is an agreement with a company called  
6 Webster Orchard, Inc. And, again, if you could turn to  
7 Page 2, Section 7, and if you can tell us how much money  
8 Webster Orchard paid to Divine?

9 A It says they shall pay to Divine -- licensees  
10 shall pay to Divine, if you look at the center portion  
11 there, a one-time payment equal to 2 percent of \$100,000  
12 of gross sales of product over the internet. So \$2,000.

13 Q Does that mean that Webster Orchard had a  
14 hundred thousand dollars of gross sales?

15 A A hundred thousand dollars of gross sales of  
16 product over the internet.

17 Q And they paid 2 percent on those sales?

18 A That's correct.

19 Q Well, if Webster Orchard was supposed to pay 2  
20 percent of this hundred thousand dollars of sales, gross  
21 sales, how can you say that close to 34 million dollars  
22 is a reasonable royalty in this case?

23 A Again, just because the differences in the  
24 use. The hundred thousand dollars is a lot smaller  
25 amount than Newegg has sold over the internet. We will



1 see in some other charts that there has been billions of  
2 dollars of sales over the internet.

3 Q And if there are billions of dollars of sales,  
4 do we have any idea if the number of transactions are  
5 the same between Newegg and Webster Orchard?

6 A We don't have the amount of transaction for  
7 Webster, so -- but presumably, for a hundred thousand  
8 dollars in sales, it wouldn't be anywhere close to the  
9 28 million that we have at issue here.

10 MR. SATINE: Let's go back to that  
11 licensing factors slide.

12 Q (By Mr. Satine) And if you could explain the  
13 last of the bullet points there.

14 A I think that's what we've talked about  
15 already, the fact that Open Market, Divine, and Soverain  
16 have licensed is significant.

17 Q Right. We've talked about Open Market and  
18 Divine. You also mentioned Soverain up there. Can you  
19 tell us about some of the Soverain licensees, who they  
20 are?

21 A Yes. Soverain, as I think has been mentioned  
22 by Ms. Wolanyk, has licensed several companies,  
23 including Amazon, Zappos, several other companies as  
24 well as Shutterfly.

25 Q Let's go to the next slide that's entitled

1 Technical Factors. Now, since you are not a technical  
2 expert, do you rely upon Dr. Grimes for your conclusions  
3 here?

4 A I do. I was here for Dr. Grimes' testimony,  
5 and I heard his testimony about the patents. And so  
6 this is, in part, related to his comments on the  
7 importance of the technology.

8 Q I would like you to turn in your exhibit book  
9 to Exhibit P-245, which is a document filed by Newegg  
10 with the United States Securities and Exchange  
11 Commission. And if you could turn to Page 78 of that  
12 exhibit.

13 I would like you to read for the jury the  
14 first paragraph under that heading Technology and  
15 Intellectual Property.

16 A Okay. So this document is from, as you  
17 mentioned, S1. And within the context of this, the  
18 technology and intellectual property, this is Newegg's  
19 document, it says that: Our technology systems are a  
20 critical component of our success and are designed to  
21 enhance efficiency and scalability. Our strategy is to  
22 develop proprietary software and license technologies  
23 from third parties as appropriate, in order to simplify  
24 and improve the customer shopping experience, as well as  
25 facilitate our fulfillment, financial, and customer

1 service operations.

2 Q Is that statement that Newegg made to the  
3 Securities and Exchange Commission consistent with the  
4 bullet points we saw on your slide relating to technical  
5 facts?

6 A This talks about the importance of the  
7 technology to Newegg. Newegg recognizes technology is  
8 important, especially in their customer experience.

9 Q Let's go to the next demonstrative, which is  
10 entitled Financial/Business Factors.

11 Can you please explain the first bullet point  
12 on this?

13 A Okay. So the first bullet point is that:  
14 Every Newegg completed transaction is assumed to be  
15 infringing all three patents at issue.

16 We talked about that earlier. That relates to  
17 the extent of use. This is for some of their completed  
18 transactions. As I understand, all the 28.3 million  
19 transactions are accused of infringing all three  
20 patents.

21 Q What does the second bullet point refer to?

22 A The second bullet point is that Newegg has  
23 become the second largest web-only retailer.

24 Some people may not have heard about Newegg  
25 before this case. It was relatively new for me as well.

1 I had heard of Amazon. But as I became involved in this  
2 case, I realized that Newegg was the second largest  
3 web-only retailer. So they are a very large company,  
4 has been quite successful with their internet sales  
5 program.

6 Q Let's take a look at the next slide and we'll  
7 come back to this one in a moment.

8 What's on this slide?

9 A This is an excerpt from Newegg's S1 or  
10 prospectus. And it says, and this is speaking for  
11 Newegg: We are a leading E-commerce company focused on  
12 selling information technology, or IT products,  
13 predominantly through our U.S. website, [www.newegg.com](http://www.newegg.com).

14 As an example of our E-commerce leadership, we  
15 are the second largest online retailer in the United  
16 States as measured by our 2008 net sales of 2.1 billion  
17 according to the 2009 Internet Retailers Top 500 Guide.

18 So they recognized in their public filings,  
19 and mentioned in their filings with the SEC, that they  
20 were the second largest retailer as well, so people  
21 would be familiar with them.

22 Q Let's look at your next slide. I believe this  
23 comes from the 2009 Internet Retailers Top 500 Guide.  
24 What are you showing us on this slide?

25 A Well, this shows -- this is taken from that

1 guide. This is the document they were referencing in  
2 their prospectus, and it mentions that 2008 web sales  
3 volumes. Number 1 is Amazon; we're all familiar with  
4 them. And then number 2 is Newegg. Then you'll see  
5 several other companies that you might be familiar with;  
6 Netflix, Zappos, Amway, several other companies.

7 If you look on the right side, there's FTD,  
8 Disney. At number 17, Ms. Wolanyk mentioned Shutterfly  
9 as an example.

10 Q Well, some of these names we have heard of so  
11 far in this lawsuit. Can you tell us which of these 20,  
12 top 20 web-only sites are licensed to practice the  
13 patents in this lawsuit?

14 A Well, at this time the companies that have a  
15 license, to my understanding, is number 1 is Amazon; you  
16 can highlight that one. Number 4, Zappos has a license.  
17 Number 12, FTD has a license. And then Number 17,  
18 Shutterfly has a license.

19 Q I think we were looking at your demonstrative  
20 called Financial/Business Factors. I think we're up to  
21 the third bullet point there.

22 MR. SATINE: So let's go back to that  
23 slide.

24 A Okay.

25 Q (By Mr. Satine) And will you please explain

1 the third bullet point.

2 A So the third bullet point here is another part  
3 of the financial and business factors. That's an  
4 important factor. It's recognizing the contributions  
5 that were made by Newegg.

6 Newegg has a whole lot of money they spend on  
7 inventory for the products they buy. They have  
8 logistics in terms of getting it from warehouses to the  
9 people. They have customer service they provide. And  
10 so that's another consideration under the financial and  
11 business factors that I certainly recognize.

12 Q Can you turn to Exhibit P-166 in your book?

13 A What's the exhibit number? I'm sorry.

14 Q 166.

15 A Okay. I have that.

16 Q Is it your understanding this is Newegg's  
17 business review from the third quarter 2005 board  
18 meeting?

19 A Yes, that's my understanding.

20 Q Let's look at Page 3 of P166 where you see the  
21 picture of this cake. And can you tell us what your  
22 understanding is of what this cake is intended to  
23 represent?

24 A Yes. This document -- we'll only talk about  
25 this page, but this document talks their assessment of

1 the marketplace.

2           This is before a board meeting, and this page  
3 that we're looking at talks about the Newegg business  
4 model. In other words, what's their recipe for making  
5 this model work that they have, this internet site?

6           And what they've done is, in the form of a  
7 cake, they've shown the important part, the important  
8 layer is the customer experience. And several layers  
9 are important.

10           You'll see they talk about three other layers,  
11 but they highlight the customer experience layer, and  
12 it's got several different pillars to it: The product  
13 management, logistics, and IT and MIS. IT and MIS  
14 stands for information technology and management  
15 information type systems.

16           THE WITNESS: And if you maybe just pull  
17 back a little bit on what you've blown up. Maybe blow  
18 up the whole top portion of the cake would be a good  
19 idea. There you go.

20           A     So the customer experience is highlighted  
21 there, and if you think about it, their front doors are  
22 basically their website. They bring people into their  
23 web, and that represents their front doors. They're not  
24 Best Buy. They don't have a bricks-and-mortar  
25 operation. Their front door is their website.

1           So they talk about -- their web experience is  
2 part of that, and they talk about several other things.  
3 Customer service. I think they provide customer service  
4 as well and all the other functions.

5           But the point is, is that interface with the  
6 customer and having a good customer experience is an  
7 important part of it, and I recognize there's various  
8 things that make up that customer experience that we've  
9 talked about.

10           MR. SATINE: Let's put up the next  
11 demonstrative entitled Newegg's Extent of Use.

12           Q     (By Mr. Satine) What are we looking at here?

13           A     So we looked at a chart similar to this  
14 before, which had their total transactions, so this  
15 shows their total transactions over this period of time,  
16 the completed online transactions.

17           Of note is, if you look at 2001, it's well  
18 less than a million transactions there. I believe it's  
19 less than a half a million transactions in that year.  
20 And it grew steadily, steadily, steadily all the way to  
21 the point where, in 2009, the last year we have a full  
22 year information for, it's nearly 12 million  
23 transactions just in that year.

24           Q     And does this relate to the last bullet point?  
25 We're going to go back to it now, your slide Financial



1 Business Factors. Does this relate to the last bullet  
2 point of that slide?

3 A Yes. One of the ways of looking at the  
4 commercial success is taking a look at what's been done  
5 with the technology and what's the extent of use.

6 Q In that last bullet point, it also talks about  
7 profitability. Did you consider profitability?

8 A Right. So now we're getting into the  
9 financial information. And so we've looked at their  
10 transactions, but I also looked at their profitability  
11 as well.

12 And there will be several charts we have on  
13 this, but I looked at their profitability from the  
14 transactions that they -- that they went ahead and had  
15 on the internet.

16 Q When you look at profitability, what  
17 profitability do you look at, from what time period?

18 A Well, in the hypothetical negotiation,  
19 ideally, you look at the projected profitability, and  
20 what's a reasonable expectation of what that  
21 profitability would be as they were entering this  
22 venture they were going into.

23 I also looked at actual profitability as well.  
24 So I looked at forecasted or projected and also looked  
25 at their actual results as well.

1           Q     Did you look at any projections from the time  
2 of the hypothetical negotiation in 2001?

3           A     I would have liked to look at projections at  
4 that time. Unfortunately, they didn't -- they said they  
5 didn't have any at that point in time. So I looked at  
6 projections that they submitted and looking as close to  
7 the hypothetical as I could.

8           Q     Okay.

9                     MR. SATINE: Let's put Exhibit P171 up on  
10 the screen.

11          Q     (By Mr. Satine) Mr. Nawrocki, if you look on  
12 the screen or in your book, what are we seeing on  
13 Exhibit P171?

14          A     Okay. So if you look at this, this is a  
15 Newegg projected income statement, and it mentions that  
16 it's with \$30 million capital raised being considered.  
17 So they were seeking to get some capital financing.  
18 And the top portion of the page talks about the dollar  
19 amounts they were projecting.

20                     THE WITNESS: Maybe you could blow up  
21 that whole portion of the top page, top portion of the  
22 page. There you go.

23          A     And so that shows their projected operations  
24 from '05 through' 08.

25                     Now, keep in mind, the hypothetical is in '01,

1 but this is as far back a projection as we obtained  
2 through the discovery process.

3 And what it shows is their estimated sales in  
4 '05 through '08. And those amounts are show in  
5 thousands of dollars. So that first month of 2005,  
6 that's \$1.6 billion, and then the next year, 2.3  
7 billion, all the way up to \$4 billion in 2008.

8 So a fairly aggressive projection, but they  
9 were candidly doing very well on their website. And so  
10 their results, you'll see, are in the billions of  
11 dollars.

12 The next line talks about their cost of sales.  
13 That's when you take a look at the cost of the product.  
14 If you have a monitor you're going to buy from them on  
15 the website, it would be the cost of the monitor that  
16 you would subtract to get the gross margin.

17 And then there's also -- SG&A is their selling  
18 and general administrative costs. And then income from  
19 operations are shown there, \$28 million all the way up  
20 to 282 million in 2008.

21 Q (By Mr. Satine) Does Newegg project a percent  
22 of profitability?

23 A Yeah. If you look at the bottom portion --

24 THE WITNESS: Maybe if you close that and  
25 look at the bottom portion.

1           A       So what they do on the bottom portion is, they  
2 do this on a percentage basis. So this is something I  
3 considered as well, is what were their percentage profit  
4 expectations.

5                   And what you'll see is that the gross margin  
6 level --

7                   THE WITNESS: Maybe you can just  
8 highlight that gross margin row all the way across, and  
9 then the same thing with income from operation two lines  
10 down.

11           A       So that represents what their profit  
12 expectations were.

13                   So gross margin, it goes from 9.4 percent all  
14 the way up to 14 percent. And what that is, is giving  
15 an example. So if you're selling a computer for \$200,  
16 you're making 10 percent profit as an example on it, so  
17 you're making \$20 of gross profit. That means you spent  
18 \$180 on the monitor, and you're selling it for 200. So  
19 that's generally how that works.

20                   The income from operations is after they track  
21 all of their accounting, financial, and corporate  
22 expenses. And they show profits there from 1.8,  
23 approximately, percent to more than 6 percent, 6.6  
24 rounded, in 2008.

25           Q       (By Mr. Satine) Okay. So you've told us that

1 you considered Newegg's projections of profitability.

2 Did you also consider Newegg's actual profitability in  
3 doing your Georgia-Pacific analysis?

4 A Yes. I could have stopped here with the  
5 projected, but I also said, well, let's take a look at  
6 their actual profitability as well just to see what  
7 things were like from their actual results.

8 So we've got another chart that explains that  
9 as well.

10 Q Okay. What are we looking at on this chart?

11 A So this is a summary of Newegg's financial  
12 results. This is overall through the company.

13 And on the left, you'll see the years from  
14 2001 to 2009, and you'll see that in 2001, the first  
15 year they started, they hit the ground running with \$115  
16 million in sales and continued on all way through 2009  
17 where they had 2 point -- more than \$2.2 billion in  
18 sales in 2009.

19 The next column shows their gross profit for  
20 each one of those years, and it goes from 11 million up  
21 to \$240 million in gross profit in 2009.

22 And then the last column to the right is their  
23 operating profit. An interesting thing is, right in the  
24 first year, 2001, they were profitable right off the --  
25 right off the bat. They made 1.6 percent in that year.

1 2002, they made 2.9 percent. So they started increasing  
2 their profitability.

3 They had some low years. And then overall  
4 you'll see that their overall percentage --

5 THE WITNESS: If you'll highlight the  
6 bottom right-hand corner.

7 A -- that overall bottom is 1.6 percent on an  
8 overall basis. And that's what they actually have done.

9 Q (By Mr. Satine) Now, a lot of numbers on this  
10 slide. After you've identified all of this, what did  
11 you do with it? How did you use it?

12 A A couple of things. We took a look at the  
13 projected profits you heard about, and we were looking  
14 at operating profits there. We also saw gross profit  
15 information here.

16 I looked at that '01 and '02 period and saw  
17 that they were doing 1.6 and 2.9 percent. So those  
18 entered into my considerations, in terms of now -- in  
19 terms of what type of royalty rate would I look at here.  
20 There's profits they're making, and so one of the things  
21 I had to consider was how to use this information in  
22 terms of determining a royalty rate.

23 Q And how did you use this information in  
24 determining a royalty rate?

25 A Well, the next thing I did is, I took a

1 portion of profits. There's a -- there's a rule in  
2 terms of calculating or assessing a royalty, taking a  
3 little portion of the profit, that's sometimes called a  
4 25- to 33-percent rule. And that says I'm going to pay  
5 25 to 33 percent or one-quarter to one-third of my  
6 profits in a royalty.

7           So if you have a patent and I want to license  
8 that patent from you, what we'd start our negotiations  
9 at is, if I'm making 10 percent, I'd say, well, let's  
10 start it at 2-1/2 to 3.3 percent, and you tune it up or  
11 down from there.

12           But it's at least a starting point in the  
13 negotiations. And it's been used in various different  
14 damage contexts, as well as valuations and licensing as  
15 well.

16           Q     Is this a Jim Nawrocki rule, or do other  
17 people use it?

18           A     No. It's been a rule. It's been around since  
19 I was a little -- since I was a little kid back in the  
20 '60s. But it's called the 25-percent rule. Different  
21 people have used it. It's been in textbooks.

22           There's mixed reactions about whether or not  
23 you should use it exclusively or you should tune it up  
24 or down. And what you'll see, based on my analysis, is  
25 you need to apply it to the specific facts of the case.

1 Q Okay. Let's look at your next slide. What  
2 does this slide entitled Profit Apportionment show?

3 A So this is how it works here, is what I've  
4 done is I've taken Newegg's average order value. It  
5 ranged -- it was sometimes over \$300. Sometimes it was  
6 a little bit less than \$200. But their overall average  
7 was \$200 per order.

8 I applied here an operating profit of 6  
9 percent. You saw the forecast was 6.5, 6.6 percent. So  
10 I've used 6 percent here to come up with an average  
11 profit per order of \$12. So if they were expecting to  
12 make 6 percent profit, the expectation would be about  
13 12 -- \$12 per order.

14 And then the next section that I did was, I  
15 apportioned it 25 to 33 percent.

16 THE WITNESS: So maybe you could  
17 highlight that portion for me, if you would. Yeah, that  
18 section right there.

19 A So that's the quarter -- one-quarter to  
20 one-third apportionment I talked about.

21 So what you do is, you apply that to the \$12,  
22 and you get \$3 to \$4, would be what the royalty rate  
23 would be. That's in the blue block -- blue boxes.

24 So that would be the starting point. The rate  
25 I came up with were 80 cents and 40 cents, and we'll



1 tell you how I got there, but this is at least a  
2 starting point.

3 Q (By Mr. Satine) Okay. Let's go to the top of  
4 the slide.

5 A Sure.

6 Q It says: Newegg's average order. Can you  
7 tell us what that means? Most people spend \$200? Is  
8 that how to you determine the average? How does that  
9 work?

10 A Well, it's -- it's an overall average taken  
11 from Newegg's documents. They produced very detailed  
12 spreadsheets in terms of what their internet order sales  
13 were, dollars and units, and the overall average is,  
14 again, a little bit more than \$200.

15 At points in time -- I think near the  
16 hypothetical, it was over \$300. But \$200, I thought,  
17 was a conservative estimate of the average order size.  
18 Now, some people might spend less than that. If you buy  
19 a cable, it might be \$30 or \$40. If you buy a monitor,  
20 it might run you \$200 or \$300. So this is the average  
21 order size.

22 Let me give you an example. My son went to  
23 Newegg two weeks ago. He was building a computer at  
24 school, and he wanted to buy all these products. So he  
25 made a transaction and spent over \$1200 on all the

1 different equipment, including the box and the fans and  
2 the CPU.

3           So some orders would be larger; some would be  
4 smaller.

5           Q     Did your son spend the \$1200 or did you spend  
6 the \$1200?

7           A     He spent my \$1200, unfortunately, but it was  
8 his graduation present.

9           Q     Okay. And then we have your -- your operating  
10 profit on this slide is 6 percent, but you told us that  
11 related to projected, right?

12          A     Well, we talked a couple of slides ago about  
13 their projection. It was really 6.5 percent. So I  
14 said, well, what -- we don't have what their expectation  
15 was at the time. So -- and this is when I used -- I  
16 used 6 percent on this slide. I've done it a couple of  
17 other ways as well.

18                So this was trying to use what would be their  
19 reasonable expectation on a go-forward basis of what  
20 their profitability was.

21          Q     Okay. Let's go to your next demonstrative.

22          A     Sure.

23          Q     I think that's the last of your  
24 demonstratives.

25          A     Yes, I think it is.

1 Q Okay. What does this demonstrative show us?

2 A Well, this is the same type of analysis, only  
3 instead of just using the 6 percent, which I used on the  
4 prior chart -- that's on the right side -- I'm now using  
5 a profitability of 1-1/2 percent on the left side there.

6 THE WITNESS: If you'll highlight that.

7 A And then the next one would be 3 percent and  
8 then 6.

9 You know, there's different profitability  
10 there. You say, well, why all the different numbers?  
11 Well, that relates to the fact that on those actuals, as  
12 well as their forecast, they were trying to anticipate  
13 what's their reasonable expectation, in terms of how  
14 profitable they'll be, and this shows different  
15 scenarios, basically.

16 Q (By Mr. Satine) So the first scenario is what?  
17 Walk us through that a little more slowly.

18 A Sure. So at the first column, it's 1-1/2  
19 percent. You apply that to the \$200 of average order  
20 size, and you get \$3 average profitability.

21 And under that, if you split it between  
22 one-quarter and one-third, you would wind up with rates  
23 of 75 cents to a dollar. So that would be a scenario in  
24 that fashion.

25 The middle column does it at 3 percent. If 3

1 percent was their expectation, then the resulting  
2 royalty rates would be 1-1/2 to \$2.

3 And if 6 percent was their expectation, you  
4 would say, well, they're expecting probably closer to  
5 their forecast, then it would be 3 to \$4.

6 So that's -- that's how this chart marks, and  
7 it's an apportionment. Oftentimes, if I have a forecast  
8 or some actual information that we knew was their  
9 expectation, we would use that; but here we had several  
10 different data points, so I -- I've included all of  
11 them.

12 Q Okay. Now, I said that was your last  
13 demonstrative, but I want to go back to one just to be  
14 sure we've covered everything.

15 A Sure.

16 Q The slide where we had your summary of the 15  
17 Georgia-Pacific Factors --

18 MR. SATINE: If we can get that back up  
19 for a moment.

20 Q (By Mr. Satine) Okay. We've talked about the  
21 licensing factors. We've talked about financial  
22 business factors. We've talked about technical factors.  
23 We've talked about the hypothetical negotiation.

24 The only one we haven't talked about yet is  
25 Factor 14, the opinion testimony of qualified experts.

1                   How did Factor 14 affect your analysis?

2           A     Well, that's where I basically bring all of  
3 the analysis together and kind of determine what the  
4 final royalty rate is. It's my opinion that I think  
5 this is a reasonable royalty rate. It's based upon my  
6 judgment of my consideration of the various  
7 Georgia-Pacific Factors that we've already been  
8 discussing.

9           Q     Okay. Tell us how you did that.

10          A     There's a whole set of data points that we've  
11 been talking about, and it's probably easier if I my use  
12 the easel to explain the scenarios here.

13                   MR. SATINE: Your Honor, may the witness  
14 get up and go to the easel?

15                   THE COURT: He may.

16                   MR. SATINE: Thank you.

17                   THE WITNESS: Can I get some water?

18                   MR. SATINE: We have water coming from  
19 all directions.

20                   THE WITNESS: I usually speak pretty  
21 loud, but let's see if I can do it.

22                   MR. SATINE: Water and a microphone.

23                   THE WITNESS: Water and a microphone.

24                   Can I try it without the microphone, if  
25 that works? I'll try to talk loud. Is it okay if I try

1 to talk loud? I'll talk loud and slow, if I can.

2 THE REPORTER: You need to speak into the  
3 microphone, please.

4 THE WITNESS: Do I? Okay. I should be  
5 able to.

6 Okay. You know what I'll need on the top  
7 chart to go through some of the data points is that  
8 profit apportionment one. I think it was the one -- the  
9 last chart that Mr. Satine said was our last overhead  
10 one.

11 Yeah, that one would be helpful.

12 Q (By Mr. Satine) Okay.

13 A So when I'm doing this analysis, we now have  
14 to determine what rate are we going to apply here to  
15 these different transactions? And there's all sorts of  
16 numbers to choose from, and so I'll try to go through  
17 different considerations.

18 So, first of all, we've got a 33-percent  
19 apportionment, and I'll put on the top here the 1.5  
20 percent profitability, the 3 percent profitability, and  
21 then the 6 percent profitability. Those --

22 Q Mr. Nawrocki, if I could just stop you for a  
23 moment.

24 MR. SATINE: Your Honor, could we just  
25 move the easel down between counsel table so the jury

1 might be able to see it a little easier?

2 THE COURT: Can the jury see from there?

3 Can y'all see it all right from there? Like it up a  
4 little closer?

5 JUROR: No. It's fine.

6 THE COURT: I think it's okay.

7 THE WITNESS: Okay.

8 MR. SATINE: Okay.

9 THE COURT: I see you're trying to do  
10 the -- okay. Yeah. You can get that a little closer,  
11 if you like.

12 THE WITNESS: This one here?

13 THE COURT: Yeah.

14 THE WITNESS: Okay. Can you move that  
15 up, if you would? My hands are full.

16 THE COURT: See if you can't find him a  
17 darker marker, too, if you have one.

18 THE WITNESS: Yeah. I'll turn it on its  
19 angle there.

20 A Okay. So the first consideration was this  
21 33-percent factor that we see up there, and then the  
22 25-percent factor we talked about.

23 So at 33 percent, the amounts per transaction  
24 were a dollar, \$2, and then \$4. Those are different  
25 rates to consider under that analysis.

1                   And then under 75 percent -- I'm sorry -- 25  
2 percent, we consider that 75 cents, a dollar fifty, and  
3 then \$3.

4                   So this provided some initial guidance, in  
5 terms of what -- what sort of rates I would consider. I  
6 then had to evaluate the different Georgia-Pacific  
7 Factors that we were talking about.

8                   We looked at various things in terms of  
9 licensing, in terms of technical factors, the business  
10 factors.

11                  And one of the important things, I thought,  
12 was, if you take a look at the fact that Newegg  
13 contributed a lot to this website, this inventory  
14 management, logistics, all the things they've done,  
15 their own development of a lot of this using -- accused  
16 to be using the technology, but I recognized that, so I  
17 said, well, let's tune it down to some other  
18 apportionments, such as 20 percent and 15 percent.

19                  Let's tune a portion of the amount down.  
20 So at this level, if you apply the 20 percent to the \$3,  
21 you get 60 cents, a dollar twenty, and then two forty.

22                  And at 15 percent times the \$3, you would get  
23 45 cents, 90 cents, and then a dollar eighty.

24                  So I give you a whole set of numbers starting  
25 with the 25-percent to 33-percent apportionment, looking



1 at other apportionments as well, that would bring it  
2 into recognition of the different Georgia-Pacific  
3 Factors that I considered.

4 So then I had to determine, based upon  
5 judgment, what rate did I feel was appropriate. And so  
6 what we have is for the '314 and the '492, I felt that  
7 80 cents would be very reasonable. In light of this, it  
8 would be conservative, but yet reasonable in light of  
9 some of these data points.

10 And for the '639, 40 cents, which is the  
11 session management one.

12 '314 and '492 relates to the whole system; the  
13 '639, at least for Newegg's application, relates to  
14 session management, and so I've used the smaller royalty  
15 rate there. So this represents the royalty rates.  
16 It's judgment based upon these different data points  
17 that I considered. It's not a calculation from these.  
18 They're a judgment that I felt, based upon these  
19 different data points, it fell well within that range.

20 Q Okay. So your -- so the range was -- you have  
21 80 cents, and that's for what patents?

22 A It's for the '314 and the '492 patents.

23 Q And then you have 40 cents, and that's for  
24 what?

25 A That's for the '639 patent.

1           Q     Did you do anything further to check the  
2     reasonableness of those two royalty rates?

3           A     Yes. After I considered this information, as  
4     I further cross-checked, I looked at a few other things.  
5     There were several other things we talked about.

6                     For example, there was an analysis on a  
7     percentage of profits -- percentage of gross profits we  
8     saw and talked about in some of the Divine licenses.  
9     There was also a percentage of sales talked about in  
10    some of those licenses. And then there were also some  
11    cents per transactions that were talked about as well.

12                    If you'll remember, one of the transactions --  
13    one of the licenses we talked about had 85 cents per  
14    transaction. And that compared, you know, favorably to  
15    the 80 cents and 40 cents I had per transaction.

16                    The percentage of sales, there were several on  
17    that. There was some at 1 percent; some at 2 percent.  
18    I think they went as high as 10 percent in terms of some  
19    of those other licenses that we saw as a cross-check.

20                    What that would be, that would represent -- 1  
21    percent would represent a 2-dollar royalty, a 4-dollar  
22    royalty, or a 20-dollar royalty. So, again, the 80  
23    cents and 40 cents are well within that.

24                    On the gross profit side, we saw some  
25    10-percent gross profits. We saw various other ones.

1 Their gross profits, a couple of different data points  
2 would be 40 -- 10 percent and 14 percent.

3 They were actually doing around 10 percent.  
4 They had forecasted as much as 14 percent gross profit.  
5 So if you turn that into a rate, that would, again, be  
6 approximately \$10 -- \$1 -- I'm sorry -- \$2 and then \$2  
7 and then 40 cents, \$2.80.

8 So the point is, I get various data points  
9 that, again, were well above the numbers I came up with,  
10 but I still felt that the 40 cents and the 80 cents that  
11 I calculated were reasonable, even based upon those  
12 cross-checks.

13 Q Okay. Mr. Nawrocki, if you could retake your  
14 seat, I still have about three or four questions. I'll  
15 move the stand.

16 Let's go back to the summary of royalty  
17 damages. Is it your opinion that using a royalty base  
18 of 28,316,504 transactions with the '314 and '492  
19 patent -- patents, that royalty damages to which  
20 Soverain is entitled in this case are \$22,653,203?

21 A Yes. I feel that is reasonable.

22 Q Is it your opinion that using a royalty base  
23 of 28,316,504 transactions, that a royalty damage award,  
24 with respect to the '639 patent in this case, would be  
25 \$11,326,602?

1           A     Yes. I feel that's reasonable as well.

2           Q     Do you think both of those rates are  
3 reasonable royalty rates?

4           A     Yes, I do.

5           Q     One last question. Mr. Sayles showed the jury  
6 a chart during the opening where he had the royalties  
7 that had been paid to Divine. Is that a fair  
8 comparison?

9           A     Not by dollar amount. As we've talked about,  
10 the extent of use in those royalties was -- paled in  
11 comparison to the use that's at issue here.

12                     An important consideration is, what is the  
13 extent of use? As we've talked about at length, the  
14 extent of use by Newegg was significant and  
15 significantly different than those.

16                     MR. SATINE: No further questions, Your  
17 Honor. We pass the witness.

18                     THE COURT: All right.

19                     Cross-examination.

20                     MR. SAYLES: May it please the Court.

21                     Your Honor, may I approach the witness  
22 and this chart for just a moment and then take the  
23 podium?

24                     THE COURT: Yes. Uh-huh.

25                     MR. SAYLES: All right.

1 CROSS-EXAMINATION

2 BY MR. SAYLES:

3 Q Mr. Nawrocki, did you allocate the royalty  
4 rate among the claims of the '314 and the '492?

5 A No, I did not.

6 Q Did you allocate the royalty rate under the  
7 '639 according to the claims?

8 A No. I assumed they were valid and infringed.

9 Q You need to speak up.

10 A I'm sorry. I assumed they were all valid and  
11 infringed.

12 Q But you -- but you didn't allocate it among  
13 one or the other claims in case one is found valid and  
14 one is invalid. You didn't do that, did you?

15 A That's correct. I did not.

16 Q And if the parties had not agreed to a running  
17 royalty back in 2001, we wouldn't be considering the  
18 royalty base of transactions that occurred in 2007 to  
19 2010; isn't that so?

20 A I think you would be looking -- well, I can't  
21 answer that.

22 Q All right. You do know that prior to the  
23 hypothetical negotiation, all of the license agreements  
24 that were entered into were what are called lump sums;  
25 isn't that right?

1           A     That's correct.  Some of -- not all of them,  
2     but most of them.

3           Q     All right.  Now, let me ask it this way:  If  
4     Newegg, at the table in 2001, and Open Market, at the  
5     table, had agreed to a lump sum, we wouldn't be talking  
6     about the transactions that occurred in '07 to 2010;  
7     isn't that so?

8           A     If they had already agreed to that back then?

9           Q     That's right.  To a lump sum.

10          A     That's correct.  If they had agreed to it, we  
11     wouldn't be talking about the transactions.

12          Q     All right.  May I take this down?

13          A     Sure.

14          Q     I'd like to go back and ask you just a few  
15     questions about your background and experience,  
16     Mr. Nawrocki.

17          A     Okay.

18          Q     Of course, this case is not your first time to  
19     testify in court, is it?

20          A     That's correct.

21          Q     In fact, it is fair to say that a large part  
22     of your professional activity is with regard to  
23     litigation; isn't that right?

24          A     I'd say a large part of my analysis or career  
25     is relating to damage analysis.  It might not be in

1 court. It might be valuations of licenses or other  
2 formats.

3 Q But most of your professional endeavors relate  
4 to claims in lawsuits; isn't that right?

5 A A majority, yes, uh-huh.

6 Q And you have been an expert witness not only  
7 in technology that involves the internet but in other  
8 areas as well; is that right?

9 A Yes, I have.

10 Q You've expressed opinions about damages  
11 regarding aircraft?

12 A Yes.

13 Q Agriculture?

14 A Yes.

15 Q Automotive?

16 A Yes.

17 Q Chemicals?

18 A Yes.

19 Q Construction business?

20 A Not in a patent context. That would be a  
21 non-patent context.

22 Q But you served as an expert witness on issues  
23 of damages in that type of case, construction.

24 A Yes. I think it was a roof that collapsed on  
25 a hangar, but okay.

1 Q Electronics?

2 A Yes, definitely.

3 Q Medical products?

4 A Yes.

5 Q Oil and gas?

6 A Yes.

7 Q Semiconductors?

8 A Yes.

9 Q Telecommunications?

10 A Yes.

11 Q Utilities?

12 A Not in a damage -- not in a patent context but  
13 in a valuation context.

14 Q All right. I'm going to stop right there, but  
15 you've given testimony or consulted in litigation  
16 matters in other areas that I didn't name as well,  
17 haven't you?

18 A That's a pretty long list. I'd say that those  
19 are -- over my 30-year career, that's probably the  
20 industries I've worked in. There might be some other  
21 ones, but those are -- those are a lot of the industries  
22 I've worked on.

23 Q You may have said this, but you provided  
24 litigation consulting assistance in more than 100 cases;  
25 isn't that right?



1           A     That's correct. Over the last 30 years, yes.

2           Q     And naturally, you do charge for your time,  
3 don't you?

4           A     Yes, I do.

5           Q     Looks like you've done a lot of work here. Do  
6 you know how much time you spent?

7           A     More than 200 hours, I'd say.

8           Q     And how much do you charge per hour, sir?

9           A     525 an hour is the rate my firm charges.

10          Q     Your firm is your firm, isn't it?

11          A     No. I have five other partners.

12          Q     You're the majority owner, aren't you?

13          A     No, I'm not. I have well less than 50 percent  
14 of the ownership.

15          Q     You've appeared in cases, either in deposition  
16 or trial, in Delaware, right?

17          A     Yes.

18          Q     Indiana?

19          A     Yes.

20          Q     Illinois?

21          A     Yes.

22          Q     New York?

23          A     Yes.

24          Q     Massachusetts?

25          A     Yes, Boston.

1 Q Norway?

2 A Norway as well, yes.

3 Q And then you mentioned a half a dozen cities  
4 or so in Texas where you've appeared in courtrooms to  
5 give testimony.

6 A That's correct.

7 Q Now, let me ask you some questions and see if  
8 we can agree on certain things before we get to any  
9 areas of disagreement, all right?

10 A Okay.

11 Q Before taking the witness stand, I'm sure that  
12 you studied your reports.

13 A Yes. I believe I have them right here. Yes.

14 Q All right. And you suspected that I might ask  
15 you some questions about your reports, and you prepared  
16 yourself for that, didn't you?

17 A Well, I wasn't sure what questions you would  
18 ask, but if you did, at least I'd have my reports with  
19 me.

20 Q All right. And your deposition was taken?

21 A Yes, it was.

22 Q And you studied that, too, I'm sure.

23 A I reread it in the last few days, yes.

24 Q All right. Transact. You're aware that

25 Transact represented the off-the-shelf publicized (sic)

1 version of core internet commerce that was owned by Open  
2 Market.

3 A I'm familiar with the Transact product. That  
4 description, if you would read it again.

5 Q Off-the-shelf productized version of its core  
6 internet commerce application, that's Transact.

7 A Yes. It's an E-commerce.

8 Q All right. In your report, you described it  
9 as off the shelf, didn't you?

10 A Well, it wasn't off the shelf like in a  
11 context of going into a store and buying it. It's  
12 something that the company had developed, so...

13 Q All right. I don't want to quibble with you,  
14 but if you look on Page 9 of your report, you described  
15 Transact as off the shelf, didn't you?

16 A This is my first report?

17 Q Yes, sir.

18 A Which paragraph?

19 Q Paragraph No. 22.

20 A Yes, I see that.

21 Q And you refer to OM-Transact, and you put it  
22 in quotes, Transact, in your report, didn't you?

23 A Yes, uh-huh.

24 Q And we've been talking about Transact in this  
25 case. Is that the Transact you intended to be referring

1 to in your report?

2 A Yes. The Transact product, I think, that was  
3 being discussed in this case.

4 Q And when you wrote up your report, you thought  
5 it was off the shelf, but now you know it's customized;  
6 is that right?

7 A No. I always knew there was some  
8 customization. And in fact, right in that sentence, it  
9 says that. It had been developing and offering on a  
10 customized basis. That's on Page 9.

11 Q All right. Let me ask you about Open Market.  
12 You had to study the history of these patents going all  
13 the way back to Open Market as part of your work, didn't  
14 you?

15 A I reviewed the patents, but the study or  
16 analysis of the patents was more related to the  
17 technical experts.

18 Q Well, you described Open Market's early  
19 success with their product called Transact in your  
20 report, didn't you?

21 A Yeah. I'm sure I had. Which paragraph are  
22 you referring to?

23 Q Well, do you remember whether you discussed  
24 their early success or not? And then I'll tell you.

25 A Yes. I -- I do recall them being very

1 successful. I think I mentioned that earlier.

2 Q All right. And on Page -- Paragraph No. 30,  
3 you wrote in your report that Open Market's early  
4 success with Transact turned out to be short lived; is  
5 that right?

6 A That's correct.

7 Q That's an accurate statement, isn't it?

8 A Yes.

9 Q In the year 2000, Open Market was experiencing  
10 a decline in its average revenues generated by Transact  
11 licenses, wasn't it?

12 A For Transact, that's my understanding, yes.

13 Q So it was on the downward slide before the  
14 hypothetical negotiation; isn't that fair?

15 A For Transact software, that's my  
16 understanding.

17 Q That embodied the patents in issue in this  
18 case. You understand that, too, don't you?

19 A They included the patents at issue, that's  
20 correct.

21 Q And Open Market's revenue actually peaked in  
22 the year 2000; isn't that right?

23 A What peaked in 2000?

24 Q Open Market's revenue peaked in 2000.

25 A Yes, absolutely.

1           Q     So at the time of the hypothetical  
2 negotiation, it had peaked and was on the downside;  
3 isn't that right?

4           A     Well, no. No, that's not correct.

5           Q     All right. Well, if it peaked in 2000, 2001  
6 is after that. That's after the peak, isn't it?

7           A     2000 was the peak.

8           Q     Isn't it true that recognition of Open  
9 Market's intellectual property, which we're talking  
10 about here, in 2002 and 2001, was limited?

11          A     I'd say that's fair.

12          Q     You actually wrote that in your report, didn't  
13 you?

14          A     Some --

15          Q     Paragraph 34?

16          A     Something similar, yes.

17          Q     Paragraph 34. Do you see that?

18                 Well, let's move on. I don't think you're  
19 quibbling with me.

20          A     No. I agree. That's why I wrote it.

21          Q     All right. Now, when Divine acquired this  
22 intellectual property, that is these patents and  
23 Transact, it ended up, because of its aggressive  
24 strategy, ending up in financial trouble, right?

25          A     Yes. I think Ms. Wolanyk talked about that as

1 well.

2 Q All right. And it struggled financially; is  
3 that right?

4 A Divine?

5 Q Yes.

6 A Yes.

7 Q Even though it owned Transact and even though  
8 it owned these patents, right?

9 A That's correct.

10 Q You know something about Newegg by virtue of  
11 your work in this case, right?

12 You studied documents?

13 A Yes, I did.

14 Q Depositions?

15 A Yes.

16 Q And Newegg was founded in 2001; is that right?

17 A Their financials were for a different company.  
18 I think they were called Magnella (sic), I believe, but  
19 Newegg had some existence. There was different  
20 relationships. I can't remember exactly when Newegg  
21 started, but --

22 Q All right. But Newegg, as we are discussing  
23 it here, was founded in 2001, wasn't it?

24 A Could we talk about just the internet site for  
25 Newegg? That would be 2001, as I understand it.

1 Q Right. Well, not to quibble with you --

2 A Okay.

3 Q -- but in Paragraph 41 of your report --

4 A Yep.

5 Q -- you actually say Newegg was founded in  
6 2001.

7 So can we go with that?

8 A Yes. And it's referencing their website,  
9 which is what they said. But in looking at their  
10 financials, they talked about different subsidiaries  
11 formed at different points in time. That's why I was --  
12 just trying to be clear.

13 Q All right. And to be clear, Newegg began as a  
14 subsidiary of a company called ABS Computer  
15 Technologies, right?

16 A That's right.

17 Q And that was the company that was a custom PC,  
18 personal computer, vendor trying to make it; is that  
19 right?

20 A That's my understanding.

21 Q And at that time, the competition was very,  
22 very strong in the personal computer area, wasn't it?

23 A I think especially in the assembly area, yes.

24 Q I may have asked you this, but I think you  
25 said it in another place in your report. I'll just ask



1 you if this is correct.

2           Despite Open Market's widely-publicized  
3 strategy of developing a broad patent licensing program,  
4 its intellectual property portfolio was not fully  
5 recognized by the E-commerce industry in the form of  
6 increased Transact sales or patent licenses.

7           That's true, isn't it?

8           A     Over a period of time, that's correct.  
9 They -- well, over a period of time, that would be  
10 correct.

11          Q     In fact, if we get right down to the bottom  
12 line, you haven't seen any evidence to indicate that  
13 Open Market ever established profitability associated  
14 with the sale of the software products that embody the  
15 patented technology.

16          A     That's incorrect.

17          Q     That's incorrect?

18          A     Right. They obtained gross profitability.  
19 They didn't obtain operating profitability.

20          Q     Turn to Page -- to Paragraph 77 in your report  
21 and tell me if I read this sentence correctly.

22                You there?

23          A     Yes, uh-huh.

24          Q     Quote, I have seen no evidence to indicate  
25 Open Market's established profitability associated with

1 its sale of software products embodying the patented  
2 technology, period, end quote.

3 Did you write that?

4 A Yes, I did.

5 Q Then if you go on down in the same paragraph,  
6 did you write: Open Market did not earn a profit at the  
7 operating level in any given year?

8 A Yes. That's what I referred to in my prior  
9 answer. At the operating profit level, they didn't.

10 Q You mentioned to the Ladies and Gentlemen of  
11 the Jury the 25-percent to 33-percent rule.

12 Do you remember that discussion?

13 A Yes, I do.

14 Q That's sometimes shorthand as the rule of  
15 thumb; is that right?

16 A Sometimes called the rule of thumb or starting  
17 point, yes.

18 Q And it's -- some people criticize that rule in  
19 the economic world; isn't that so?

20 A There's some criticism of using it arbitrarily  
21 and some -- some support for using it in different  
22 analyses. Some courts have used it, and some articles  
23 have commented on it.

24 Q I want to go back for a moment to Defense  
25 Exhibit 223, which is the Johnson & Johnson license.

1 And I think it's a different exhibit number in your  
2 book, actually, but I'm going to put it up here.

3 A Okay. That's fine. You'll put it up on the  
4 screen?

5 Q Yes, I will.

6 A That's fine.

7 MS. JOHNSTON: What number?

8 MR. SAYLES: It's Defense Exhibit 223.

9 Q (By Mr. Sayles) Now --

10 MR. SATINE: Mr. Sayles, I believe it's  
11 Plaintiff's 185, if Mr. Nawrocki wants to look at it.

12 Q (By Mr. Sayles) Okay. If you want to look at  
13 it in your book --

14 A Okay.

15 Q -- feel free to turn to it. And I think I've  
16 got it on the screen for you.

17 A All right.

18 Q You told us your background, and you're not a  
19 lawyer, are you?

20 A I'm not a lawyer.

21 Q And it's not your job to interpret contracts  
22 or give legal interpretation to them, is it?

23 A That's correct.

24 Q From an economic standpoint, you just read  
25 what you see and do the best you can, don't you?

1           A     Yes. I'm familiar with the terms of licenses  
2     certainly, and so I read them, and I'm generally  
3     familiar with different contexts.

4           Q     All right. If we look at this document in  
5     Paragraph 1(b), which is the field of use that -- you  
6     were asked a few questions about it, and I want to take  
7     you through a little bit more of that.

8                     It says means the -- field of use means the  
9     development and operation of intranet and internet  
10    websites by licensee, solely for licensee's internal  
11    business purposes, which may include dissemination of  
12    information related to licensee's products and services  
13    and the sale, use, manufacture, or distribution of  
14    licensee's products and services and for no other  
15    purpose.

16                    Do you see that?

17           A     Yes, uh-huh.

18           Q     Now, you've given us your interpretation of  
19    that agreement, but you're basing that on just your  
20    reading of the document; isn't that so?

21           A     It's my understanding of the context of that  
22    clause, but certainly attorneys might have different  
23    perspectives on it. I just know that referred to  
24    internal business purposes.

25           Q     All right. I want to refer you to Plaintiff's

1 Exhibit 194, which is the Katco license agreement.

2 A Okay.

3 Q Do you remember being asked a few questions  
4 about that?

5 A Yes, I do.

6 Q And there it says: The licensee operates  
7 cosmeticmall.com website. That's in the second whereas  
8 clause at the top.

9 A Yes, I see that.

10 Q And the license -- the patents that are  
11 licensed here include what's listed in 1(a), which  
12 includes the '780, the '314, and the '492; is that  
13 right?

14 A That's correct.

15 Q The two patents-in-suit, plus the parent of  
16 the third patent; is that right?

17 A That's correct.

18 Q And in Paragraph No. 2 here, it says that the  
19 license during the term of this agreement and subject to  
20 the payment specified in Paragraph 7 below, Divine  
21 grants to licensee a paid-up, non-transferable,  
22 non-exclusive license.

23 Do you see that?

24 A Yes, I do.

25 Q All right. And as someone familiar with

1 reading license agreements, you know what paid up means,  
2 don't you?

3 A Yes.

4 Q That means a one-time fee, and you're done,  
5 doesn't it?

6 A Yes.

7 Q And you were asked some questions about this  
8 Paragraph 7 being for \$1,000 and a representation that  
9 that represented 10 percent of the gross profit of sales  
10 of product over the internet in Paragraph 7.

11 Do you remember being asked about that?

12 A Yes, I do.

13 Q Now, you know that the term of this license  
14 was granted until these patents expired. Did you know  
15 that?

16 A That's usually the case, but let me take a  
17 look.

18 Q Paragraph 22.

19 A Yes, I see that.

20 Q All right. And so if we look at this  
21 document, \$1,000 was paid by this company, one-time,  
22 paid up for the full life of the patents, even if their  
23 business skyrocketed in the future; isn't that so?

24 A That would seem to cover that as well.

25 Q One of the benefits of a lump-sum payment at

1 the bargaining table is, the party receiving the money  
2 doesn't have to -- they have a guarantee; they get the  
3 amount they agree upon, regardless of the success of the  
4 other party; isn't that right?

5 A It could have been a benefit to the licensor,  
6 but it might not always be a benefit to the licensor.

7 Q All right. Let's look at Plaintiff's Exhibit  
8 199. And this is the license agreement that you were  
9 asked about with -- I'm going to call it Odino,  
10 O-D-I-N-O.

11 A I think it's Odimo, I think.

12 Q Okay. Do you recall being asked about this  
13 license?

14 A If you don't mind, Mr. Sayles -- I'm sorry.  
15 The exhibit number?

16 Q It's Plaintiff's Exhibit No. 199.

17 A Okay. I have that.

18 Q And I do want to be sure you're with me, so --

19 A Yeah, I'm with you.

20 Q -- if you will, look in -- the licensed  
21 patents, it does include the '314, the '780, the '424,  
22 and the '492 by number in Paragraph 1(a), doesn't it?

23 A That's correct.

24 Q That would to be the patents-in-suit in this  
25 case; is that right?

1           A     That's correct.

2           Q     And if you go down to Paragraph No. 2, it says  
3     that Divine grants to licensee a paid-up,  
4     non-transferrable, non-exclusive license. Do you see  
5     where it says that?

6           A     Yes.

7           Q     And paid up here means the same thing it meant  
8     just a minute ago, paid up one time for good; isn't that  
9     right?

10          A     Generally paid up in one time. Sometime it  
11     could be multiple payments, but paid up.

12          Q     All right. And if we look at Paragraph No. 7,  
13     that's where the \$30,000 is; is that right?

14          A     That's correct.

15          Q     So if the business of this company skyrocketed  
16     after they paid for their paid-up royalty, they wouldn't  
17     owe any more money, would they?

18          A     I'm not aware of them needing -- owing any  
19     more money, if their business took off from here.

20          Q     They would have paid their 30,000, and that's  
21     it; is that right?

22          A     That's my understanding.

23          Q     And if we look at Paragraph 22 of this same  
24     document, just to be sure, the term of this agreement is  
25     until the licensed Divine patents expire.



1 Do you see that?

2 A Yes, I do.

3 Q I'd like you to take a look at Plaintiff's  
4 Exhibit 202 that you were asked about. This is the  
5 license agreement with Webster Orchard. Tell me when  
6 you're there.

7 A All right. I'm there.

8 Q All right. And this is a license agreement  
9 between Divine on the one hand and Webster Orchard on  
10 the other hand in September of 2002; is that right?

11 A Yes.

12 Q Paragraph 2. Once again, this is a paid-up,  
13 non-transferable license, isn't it, according to its  
14 terms?

15 A That's correct.

16 Q And if we turn the page to Paragraph No. 7,  
17 even though there's a recitation that this is equal to 2  
18 percent of the licensee's gross sales, the payment is 2  
19 percent of \$100,000 one time, paid up for the life of  
20 the patents; isn't that right?

21 A That's my understanding.

22 Q In these transactions of Newegg that you had  
23 up on the chart as your royalty base -- you remember the  
24 number of transactions?

25 A Yes, uh-huh.

1 Q Did you do a subtraction for the transactions  
2 where a single item only was purchased?

3 A No. This includes all completed transactions.

4 Q All right. And if we look in your report or  
5 your deposition and in your testimony now, you are not  
6 taking into account the possibility that single-item  
7 transactions are non-infringing, are you?

8 A I don't have an opinion on the infringement.

9 Q But you haven't -- but you haven't backed out  
10 the single-item transactions in all these numbers you've  
11 given us.

12 A I've included all completed transactions.

13 Q Now, I think that we can agree on this. To be  
14 clear with the jury, it is not your job and is not your  
15 background and expertise to give opinions on the  
16 validity of these patents; is that right?

17 A That's correct.

18 Q Your job is to assume that they're valid; is  
19 that right?

20 A That's correct, as we talked --

21 Q And it's the jury's job to decide that; is  
22 that right?

23 A The validity?

24 Q Yes, sir.

25 A Yes. The validity will be decided by the jury

1 and the Court.

2 Q And it's not your expertise or your place in  
3 this courtroom to testify about infringement either, is  
4 it?

5 A That's correct. That's not my role.

6 Q You assume it.

7 A I assumed it, right.

8 Q And that's up to the jury to decide in this  
9 case; is that right?

10 A Final determination is up to the jury.

11 Q All right. And it would be wrong for anyone  
12 to infer that you are expressing an opinion from a  
13 professional standpoint on either validity or  
14 infringement, wouldn't it?

15 A I have no opinion on validity or infringement  
16 here.

17 Q All right. Let's talk about the royalty rate  
18 you came up with of a dollar twenty per transaction.

19 That's what it is, isn't it?

20 A The 80 cents and the 40 cents is a dollar  
21 twenty, that's right.

22 Q All right. And you said you made some  
23 deductions from other numbers that you calculated.

24 Do you remember that testimony?

25 A I don't recall saying deductions. I said

1 other apportionments.

2 Q All right.

3 A Is that what you're referring to?

4 Q Yes, it is.

5 A What I had it on the easel over here.

6 Q Yes.

7 A Yes.

8 Q Now, these apportionments --

9 MR. SAYLES: May I approach this easel,

10 Your Honor?

11 THE COURT: Yes, you may.

12 Q (By Mr. Sayles) These apportionments --

13 A Excuse me. I'm sorry. Could you just turn  
14 the easel slightly?

15 Q I'm sorry.

16 A That's good. That's fine.

17 Q These apportionments are your opinion of what  
18 is a proper adjustment or apportionment of this; is that  
19 right?

20 A Those are my calculations of an apportionment  
21 based upon recognition. So that's a judgment, as is the  
22 80 cents and the 40 cents.

23 Q A recognition of one thing is Newegg's  
24 contribution to its success by, among other things, good  
25 customer service, right?

1           A     Uh-huh.

2           Q     But you haven't done an economic analysis  
3 where you attribute specific numbers to the contribution  
4 of customer service, have you?

5           A     A dollar amount to the customer service?

6           Q     Dollar amount.

7           A     No. I have not put a dollar amount to the  
8 customer service.

9           Q     Or a specific percentage.

10          A     Not specifically to customer service, but the  
11 remaining amount would be for Newegg.

12          Q     Right. And similarly, you haven't put a  
13 number, based on economic analysis, on an adjustment for  
14 persons who are attracted to Newegg because of the good  
15 prices, have you?

16          A     Not a specific number, but that's also  
17 included in the 80 to 85 percent that I'm giving to  
18 Newegg.

19          Q     All right. But that's -- that's just your  
20 judgment and opinion there --

21          A     That's correct.

22          Q     -- isn't that right?

23          A     That's correct.

24          Q     We don't have a specific economic analysis  
25 analyzing each of the factors that Newegg contributes

1 here, do we?

2 A Not other than looking at their overall  
3 financials and their overall profitability.

4 Q Otherwise, it's your opinion; is that right?

5 A Based upon the information that they provided.

6 Q Are you aware of specific survey information  
7 about why customers are attracted to Newegg?

8 A I don't recall if there was survey information  
9 that was available. I know there's various criteria,  
10 including customer service, logistics, and things like  
11 that, but I don't recall if there was customer service  
12 information.

13 Q All right. As a damage expert witness, on  
14 occasion, you've done surveys yourself, haven't you?

15 A In a few instances, I've done surveys.  
16 Oftentimes, I've worked with other survey experts.

17 Q Here, did you do any sort of survey to  
18 determine what low pricing has to do with Newegg's  
19 success?

20 A No. I assumed that was a consideration.

21 Q Did you do any survey or analysis to determine  
22 what its award-winning customer service contributed?

23 A No. I assumed that was a consideration as  
24 well.

25 Q Or fast shipping?

1           A     I considered that as well.

2           Q     But you can't quantify it with a survey, can  
3 you, what that contribution is?

4           A     That's correct. There's no survey that I've  
5 done to assess what amount was relating to fast  
6 shipping, how many people went there for fast shipping.

7           Q     And actually, there's no specific economic  
8 analysis, other than your judgment about it, in your  
9 report or your deposition; isn't that right?

10          A     That's correct. I did not do a survey or an  
11 economic analysis of the specific attributions to  
12 customer service or fast shipping.

13          Q     Or any other aspect of Newegg's contribution  
14 to its own success; isn't that right?

15          A     Other than the documents that I saw that  
16 Newegg produced.

17          Q     You did some calculations of what Newegg's  
18 operating net profit was, didn't you?

19          A     That's correct.

20          Q     In actual fact, it comes out to about \$2.94  
21 per transaction; is that right?

22          A     I -- it depends on how you're calculating it.  
23 You talking about the entire period?

24          Q     Well --

25          A     Which period are you referring to?

1           Q     You calculated it at \$2.94 for some period of  
2 time, didn't you?

3           A     I would have to take a look.

4           Q     Per transaction I'm talking about.

5           A     Per transaction, I have calculations we went  
6 through at \$3, which is close to the 2.94, \$6 and \$12.

7           Q     Right. And the \$6 and \$12 you based on  
8 projections; isn't that right?

9           A     By expectations or projections.

10          Q     That's right.

11          A     The \$6 was a projection; the \$3 was my looking  
12 at what their profitability was in the earlier years,  
13 but expectations of what their anticipated profitability  
14 would have been.

15          Q     And if their expected profitability is about  
16 \$3 per transaction, \$1.20 royalty per transaction is  
17 taking 40 percent of their profit; isn't that right?

18          A     \$1.20 would be 40 percent of the \$3, if you  
19 use the \$3.

20          Q     Well, in some of your numbers you did use \$3,  
21 didn't you?

22          A     Yes. And in some there was \$12, which would  
23 be then 10 percent of their profits.

24          Q     And so it is your opinion, as I understand it  
25 then, that, back in 2001 at the bargaining table, when



1 Open Market was on the decline and Newegg was just  
2 getting started, that it would have reached an agreement  
3 that could actually pay to Open Market upwards to 40  
4 percent of its profit? That's your opinion?

5 A I don't think that's what the time period  
6 would suggest. At that time period, the profitability  
7 and the average prices were different than that.

8 Q But if they agreed to a running royalty, as  
9 you express your opinion that they would, and achieve  
10 the success they did, that's the very result; isn't it?

11 A Not that it's 40 percent of their anticipated  
12 profits, no. It would be -- at that point in time, it  
13 would be much less than 25 percent of their anticipated  
14 profits.

15 Q But in 2007 to 2010, would you at least  
16 acknowledge that your suggested royalty rate would be a  
17 high percentage of Newegg's total operating profit?

18 A For 2007 to 2009, their --

19 Q 2010, I'm sorry. The damage period.

20 A Yes. 2007 to 2010, that period?

21 Q Yes.

22 A Their profitability ranged from 1.6 to 2.4  
23 percent.

24 So if you used -- you could use 2 percent as  
25 an approximate average for that period is their actual

1 profitability.

2 Q And the average transaction was about \$200?

3 A Approximately \$200.

4 Q And if you charge \$1.20 royalty, what  
5 percentage of the profit is that? Can you do the math  
6 on that?

7 A 2 percent times \$200 would be \$4  
8 profitability, and that would represent 30 percent;  
9 \$1.20 would represent for that period under that  
10 scenario.

11 Q I may have asked you this, if I did, forgive  
12 me.

13 Other than using the 25-percent rule, which  
14 you applied to Newegg's profit margin, did you make any  
15 mathematical adjustments to your royalty rate or royalty  
16 base?

17 A Yes. The royalty -- well, the royalty base  
18 includes the transactions that are accused of  
19 infringement. That doesn't represent all their sales.  
20 There are some additional sales they have in addition to  
21 those. So that's been adjusted to just include the  
22 accused transactions.

23 Q Did you make any mathematical adjustment to  
24 your royalty rate based upon economic analysis  
25 specifically?

1           A     I would say it was based upon my analysis of  
2 the business information. I wouldn't say to some extent  
3 one could regard that as an economic analysis. I would  
4 regard it as more of a business analysis and business  
5 judgment based upon the business plans and other  
6 information that Newegg produced in terms of the  
7 importance of this type of technology to them.

8           Q     One of the things that I think that you have  
9 clearly assumed here is that the technology that is  
10 embodied in the patents is integral, critical, or  
11 fundamental to Newegg's business; is that right?

12          A     I think that's fair.

13          Q     And if that turns out to be incorrect, then  
14 your opinion on damages would similarly be incorrect?

15          A     The judgment in terms of how critical the  
16 nature would be, I relied upon the technical experts.  
17 If it's not as critical, and that's a judgment for the  
18 jury, then adjustments may or may not be necessary.  
19 It's the damages calculation.

20          Q     All right. You know that Soverain and Newegg  
21 are not competitors in the marketplace, don't you?

22          A     That's correct. I think there was some  
23 discussion about Newegg Mall; but in general, I think  
24 that's the case.

25          Q     And so what Soverain is claiming here, and

1 what you're supporting, is not any lost profits or lost  
2 sales by Soverain, but rather a royalty; is that right?

3 A That's correct. The calculation is a  
4 reasonable royalty or compensatory damages for  
5 reasonable royalty.

6 Q Because Soverain hasn't lost any sales or  
7 profits on account of Newegg, have they?

8 A Has Soverain lost any sales?

9 Q Sales or profits on account of Newegg.

10 A I have not been asked to analyze that. But  
11 Soverain is in the marketplace of selling software, but  
12 I'm not aware of any specific lost sales. I'm not  
13 saying they haven't.

14 Q And you do recognize that the products that  
15 are sold by Newegg -- the televisions, the computers,  
16 the cables, et cetera -- are not patented products;  
17 rather it's the process or method that we're talking  
18 about here?

19 A Products may or may not be patented, but  
20 not here.

21 Q Not by these?

22 A Not by these patents.

23 Q All right. You've testified, as you've  
24 acknowledged to me, quite a few times.

25 A Yes.

1           Q     And isn't it true that you've never concluded  
2     that it would be appropriate to award a lump-sum royalty  
3     in a software or internet-related case?

4           A     Did you say a lump sum in those cases?

5           Q     Yes. You have never concluded it would be  
6     appropriate to award a lump-sum royalty in a software or  
7     internet-related case. Never.

8           A     I think that's probably fair. They have been  
9     based upon the extent of use. I couldn't say with  
10    absolute certainty, just because I'm under oath, but I  
11    don't recall of one as I sit here today.

12          Q     All right. I will acknowledge it is not your  
13    opinion, but reasonable people can disagree when it  
14    comes to opinions; isn't that right?

15          A     Certainly.

16          Q     And here a lump-sum license might have been  
17    agreed to in 2001. That's a possibility; isn't it?  
18    It's not your opinion, but it's possible.

19          A     Possibility, but it would consider extent of  
20    use as well.

21          Q     Did you testify in this case that, under some  
22    circumstances, a lump-sum payment could be appropriate?

23          A     I don't recall if I did.

24          Q     All right. Just to refresh your memory, look  
25    at Page 106, Line 15 and 16 of your deposition and see

1 if you said something like that.

2 A I don't have my deposition here.

3 Q Oh, all right.

4 Does that sound familiar to you?

5 A I'd have to take a look and see, if you don't  
6 mind.

7 Q All right. Let's go the Page 106, Line 15 and  
8 16.

9 Do you recall this question and giving this  
10 answer?

11 A Give me just a second so I can read it, if you  
12 don't mind.

13 Q Sure, of course.

14 Look at 106, Line 10, and the answer  
15 following.

16 A Okay.

17 Q Do you see where you said that the damages  
18 amount would be a running or lump sum, it would need to  
19 be commensurate with the use?

20 A Yes, commensurate with the use, that's  
21 correct.

22 Q All right. And in 2001 there really wasn't  
23 very much use by Newegg because they were just starting  
24 up, right?

25 A That misinterprets the lump sum. Lump sum

1 would be based upon projected use. That's how you would  
2 calculate a lump sum, based upon the projected  
3 anticipated use.

4 Q All right. But if you did that and you put  
5 yourself back in 2001, a lump sum might have been agreed  
6 upon at that bargaining table.

7 A It's possible, as I said here.

8 MR. SAYLES: May I confer with my  
9 co-counsel just for a moment, Your Honor?

10 THE COURT: You may.

11 MR. SAYLES: I pass witness.

12 THE COURT: Redirect.

13 MR. SATINE: Your Honor, redirect?

14 THE COURT: Uh-huh.

15 REDIRECT EXAMINATION

16 BY MR. SATINE:

17 Q Mr. Nawrocki, at the time of the hypothetical  
18 negotiation on the eve of infringement, how many  
19 transactions was Newegg at?

20 A At the eve of infringement?

21 Q Yes.

22 A None at that point in time.

23 Q Today, in this courtroom, how many millions of  
24 transactions has Newegg had?

25 A We talked about that earlier. Over 50

1 million; 28 million for the last few years, but over 50  
2 million since '01.

3 Q Now, Mr. Sayles took you to your deposition  
4 testimony, and in that deposition testimony, I believe  
5 you were talking about commensurate with use. Can you  
6 explain that to us?

7 A Yes. It might be helpful if you would call up  
8 the deposition.

9 MR. SATINE: Could you put that back up,  
10 Page 106 of Mr. Nawrocki's deposition?

11 A Yes. So you see at Page 106, Line 16 -- 15  
12 through 17, the damages amount would be a running or  
13 lump sum and would need to be commensurate with that  
14 use.

15 So if a license was done on a lump-sum basis  
16 or a running basis, it would be commensurate with that  
17 use. So I've calculated damages on a running basis.

18 Q (By Mr. Satine) So you've taken the 28,316,504  
19 transactions into consideration in calculating a  
20 royalty?

21 A Yes, I have. And that's fairest for both  
22 sides. If they don't use the technology a lot, then  
23 they don't pay a lot. If they use the technology a lot,  
24 then they pay more. It's commensurate with use.

25 A lump sum would be different than that, if



1 it's not based upon use.

2 MR. SATINE: If you could go to Exhibit  
3 P185 back on the screen.

4 Q (By Mr. Satine) I think Mr. Sayles asked you  
5 some questions about Paragraph 1(b).

6 MR. SATINE: If you could blow up  
7 Paragraph 1(b).

8 A Okay.

9 Q (By Mr. Satine) Now, Mr. Sayles focused on the  
10 sentence which says -- first sentence which says: Field  
11 of use means development and operation of intranet and  
12 internet websites by licensee solely for licensee's  
13 internal business purposes.

14 And then there's a parentheses, right?

15 A Yes.

16 Q Okay. Let's jump over everything in the  
17 parentheses and jump to the end of the parenthesis and  
18 continue.

19 And for no other purpose. Can you tell us  
20 your understanding of that?

21 A Yes. My understanding is that the licensee,  
22 Johnson & Johnson, could use this for internal purposes,  
23 not for external purposes, in terms of sales to third  
24 parties. It specifically talks about that in the next  
25 area.

1           In no event will an internal business purpose  
2 include the distribution of software to third parties.

3           Q     And if we look within the parentheses, it  
4 says: Which may include dissemination of information  
5 related to licensee's products and services and the  
6 sale, use, manufacturing, or distribution of licensee's  
7 products and services.

8           What was your understanding of that language  
9 in the parentheses?

10          A     The dissemination of information could be  
11 things like product brochures, product details, that  
12 type of information related to the sales or  
13 distribution, an internal distribution system.

14           You might want to have some type of security  
15 over that so other people wouldn't obtain it, and so  
16 this would provide that type of security within the  
17 session management patents -- or patent.

18          Q     Mr. Sayles also asked you about all the courts  
19 you've appeared in around the United States and in  
20 Norway, and he went through a lengthy list.

21           Have you been recognized as an expert witness  
22 with respect to damages in each of those courts around  
23 the United States and in Norway?

24          A     Yes, I have.

25          Q     One more time. Using the royalty base, that

1 was based upon usage; is that correct?

2 A That's correct. This royalty base was based  
3 upon the extent of use here.

4 Q And based upon usage, what was the royalty  
5 that you calculated was a reasonable royalty in this  
6 case?

7 A Total amount of 33,979,805.

8 MR. SATINE: No further questions, Your  
9 Honor.

10 THE COURT: All right. Thank you.

11 Recross?

12 MR. SAYLES: May it please the Court.

13 RECCROSS-EXAMINATION

14 BY MR. SAYLES:

15 Q While you have been recognized, as you say, as  
16 an expert witness in the courtrooms you've appeared in  
17 around the country and other places in the world, your  
18 opinion is sometimes accepted and sometimes not; isn't  
19 that right?

20 A The ultimate decision is a matter for the jury  
21 and the Court, that's correct.

22 MR. SAYLES: Pass the witness.

23 THE COURT: Thank you.

24 Anything further?

25 MR. SATINE: Nothing further.

1 THE COURT: All right. You may step  
2 down.

3 All right, Ladies and Gentlemen of the  
4 Jury, I think we'll call it a day with that. You've  
5 been very attentive today.

6 Let me just -- before we do that, does  
7 Plaintiff rest?

8 MR. ADAMO: As you can see, I just got an  
9 emergency message from -- there are -- there's some  
10 evidentiary issues that are still open, as far as  
11 admission of exhibits.

12 Other than us, hopefully, resolving them  
13 outside of the presence of the jury -- this is not  
14 something that's a jury issue -- I think I informed the  
15 Court earlier there were issues about exhibits that I  
16 had used with Dr. Grimes that Mr. Sayles had agreed were  
17 okay. He agreed that they could be marked and treated  
18 as demonstratives.

19 I informed Your Honor that I felt that  
20 they were entitled to come in -- all the way into  
21 evidence. In brief, he hasn't responded yet. Open  
22 issues like that.

23 Other than that, you've heard all of our  
24 testimony. We just have some housekeeping issues to get  
25 things in.

1 THE COURT: Okay. Well, I want to get  
2 the Plaintiff rested. So what do you need to do to  
3 rest?

4 MR. ADAMO: Get these evidentiary issues  
5 resolved or get you to agree that you will resolve them.

6 I'll abide by the decision.

7 THE COURT: Do you rest other than the  
8 Court resolving these evidentiary issues?

9 MR. ADAMO: Yes, these various  
10 evidentiary issues. Yes, I rest otherwise.

11 THE COURT: All right. Very well.

12 All right, Ladies and Gentlemen of the  
13 Jury, that gets us through the evidence for the  
14 Plaintiff's case. We'll come back in the morning and  
15 begin the evidence in the Defendant's case.

16 There may be some other documents that  
17 may be admitted that are not admitted that -- based upon  
18 some evidentiary rulings I have to make, but I'll take  
19 care of that this evening, and y'all can go on home.

20 I hope you have a good evening. Drive  
21 careful. Get some rest. You've been very attentive  
22 today. We thank you for your service.

23 Please remember my instructions. Do not  
24 discuss the case with anyone else or among yourselves.

25 Don't make any independent investigation.

1 And we'll see you back here in the morning.

2 I think we're making good progress toward  
3 being through this week. So with those encouraging  
4 words, y'all have a good evening. You are excused.

5 COURT SECURITY OFFICER: All rise for the  
6 jury.

7 (Jury out.)

8

9 THE COURT: All right. Please be seated.

10 MR. SAYLES: Your Honor, I have a motion  
11 that I'd like to make before we adjourn today.

12 THE COURT: Oh, I'm going to let you.

13 MR. SAYLES: All right.

14 THE COURT: I just want to get these --  
15 the evidence all in here.

16 What are we arguing over here?

17 MR. ADAMO: The bench memo, do you have a  
18 copy of that, Your Honor?

19 I'm sorry, Your Honor. Pardon my back.

20 Your Honor, here are three copies of the  
21 bench memo that I gave to Mr. Sayles several days ago.

22 MR. SAYLES: Can you remind me?

23 MR. ADAMO: Yes. This is the -- on  
24 Sunday morning, I handed you two bench memos.

25 One has been resolved as a result of His

1 Honor's rulings this morning. That was the second part  
2 of the --

3 THE COURT: Okay. What exhibit numbers  
4 do you wish to offer?

5 MR. ADAMO: P54, P244, and 62B, Your  
6 Honor.

7 THE COURT: All right. And which ones  
8 are those? Do you have them up here? Are they blown  
9 up?

10 MR. ADAMO: They were used during  
11 Dr. Grimes' testimony. 54 and 244 are the collection of  
12 the hundred and something slides that he used.

13 Remember, Your Honor, there was source  
14 information on all of the slides, and this memo  
15 demonstrates that under the law, the slides can come in  
16 as 1006 summaries.

17 THE COURT: Okay. And what's P62B?

18 MR. ADAMO: That is where he had taken  
19 Mr. Wu's testimony in the right-hand column.

20 MS. CRADDOCK: They agreed to 62B.

21 MR. ADAMO: I'm sorry?

22 MS. CRADDOCK: They agreed to 62B.

23 MR. ADAMO: Okay. Thank you.

24 THE COURT: So 62B is already in?

25 MR. ADAMO: 62B is already in, Your

1 Honor.

2 THE COURT: So we're talking about 54 and  
3 244.

4 MR. ADAMO: We are, Your Honor.

5 THE COURT: All right. What's your  
6 objection, Mr. Sayles?

7 MR. SAYLES: Judge, I'm going to be very  
8 straightforward with you. I'm so tired I've forgotten  
9 what they are, to tell you the truth.

10 THE COURT: Okay. All right.

11 MR. SAYLES: I really have.

12 THE COURT: Okay. All right. Well,  
13 they're admitted.

14 MR. ADAMO: Thank you, Your Honor.

15 THE COURT: You bet.

16 MR. ADAMO: And what were the ones --

17 THE COURT: Motion for JMOL.

18 MR. SAYLES: Well, we are not going to  
19 make the JMOL at this time. This is a different motion  
20 that I want to make.

21 THE COURT: Okay. All right. I am going  
22 to hear JMOLs this evening, though, so...

23 MR. SAYLES: You are?

24 THE COURT: Yes.

25 MR. SAYLES: Okay. I'm looking for my



1 lawyer there, Judge.

2 THE COURT: Looking for some help. I  
3 understand.

4 MR. SAYLES: Yes.

5 May it please the Court.

6 Now that Mr. Nawrocki has testified,  
7 Mr. Nawrocki admitted that he did not subtract one-item  
8 orders in his testimony.

9 THE COURT: Did not subtract what?

10 MR. SAYLES: One-item orders, where a  
11 single item was ordered on the Newegg website. And in  
12 this case, Mr. Grimes testified that such orders do not  
13 infringe these patents.

14 We would move to strike Mr. Nawrocki's  
15 testimony concerning the number of orders that he  
16 testified to as his base and the total royalties for  
17 shopping cart patents under Federal Rule 402 and 403.

18 In particular, Mr. Nawrocki claims that a  
19 royalty of 80 cents per order is a reasonable royalty  
20 for infringing uses of the shopping cart patents;  
21 however, Mr. Nawrocki counts orders that include orders  
22 in which only one item was placed in the shopping cart.

23 As Mr. Grimes testified, these orders do  
24 not constitute an infringing use. For this reason, any  
25 testimony from Mr. Nawrocki that the proper royalty base

1 for the shopping cart patents is the entirety of Newegg  
2 orders is incorrect as a matter of law and should be  
3 stricken, and the jury should be asked to disregard it  
4 as irrelevant under Federal Rule 402.

5 And in that regard, I want to cite to the  
6 Court a case that I know the Court is familiar with,  
7 Lucent Technologies, in which it says the damages award  
8 can't be supported by evidence that the infringers also  
9 used additional non-infringing features.

10 Only when the date picker is used to fill  
11 out a form does infringement occur. All other means of  
12 filling out a form, such as typing in the entire date,  
13 do not infringe. The damages award ought to be  
14 correlated in some respect to the extent of the  
15 infringing method as used by consumers.

16 And so for that reason, Your Honor, we  
17 submit -- and I won't repeat myself -- that Mr. Nawrocki  
18 did not take the single-item orders into account, and  
19 his testimony should be stricken.

20 THE COURT: Okay. Response?

21 MR. ADAMO: Yes, Your Honor.

22 Dr. Grimes -- I'm sorry. I didn't mean  
23 to show the Court my back.

24 Dr. Grimes gave no such testimony. This  
25 was -- if you recall, this was the back and forth about

1 something being programmed in a certain -- in a  
2 certain -- certain way that we went through when -- I  
3 think you remember that was my -- my -- my redirect.

4 The fact that the -- being programmed to  
5 receive a plurality, that's all the claim limitation  
6 requires.

7 If you happen to -- and that's what he  
8 testified to, that it was, in fact, programmed to  
9 receive a plurality.

10 If in certain instances, a customer only  
11 hit one, that doesn't change the fact that he's  
12 testified, and it's now a jury issue, that programming  
13 is -- is -- is required by the claim is, in fact,  
14 present. That's the -- that's the --

15 THE COURT: You're saying the claim is  
16 infringed even when someone just purchases one item?

17 MR. ADAMO: The claim -- the system  
18 claims are infringed as long as the computer is  
19 programmed to receive a plurality. It doesn't have to  
20 receive a plurality. The programming just has to be  
21 capable of receiving a plurality. That's what I took  
22 Dr. Grimes through on redirect.

23 System claims are structure. And the  
24 issue is, were they so programmed? And he testified  
25 they were programmed to receive a plurality. As long as

1 they're programmed to receive a plurality, what they did  
2 or didn't receive is irrelevant.

3 THE COURT: Response?

4 MR. SAYLES: Judge, I think that I would  
5 be actually repeating myself, but I will respond  
6 briefly.

7 In the Lucent case, what was involved  
8 there was a method --

9 THE COURT: Well, I'm not so -- well, I  
10 mean, you can get that -- to that in a moment, but what  
11 I would really like to know about is, did you elicit  
12 from Dr. Grimes' testimony where he indicated that a  
13 single item purchase would not infringe?

14 MR. SAYLES: I believe that we did.

15 THE COURT: Do you have that testimony  
16 for me?

17 MR. SAYLES: Can you look it up?

18 THE COURT: Well, go ahead with your  
19 argument, and I may...

20 MR. SAYLES: Judge, I -- again, I'm going  
21 to shoot straight with you. I've given you my best  
22 argument, and I've stated my position as best I can, and  
23 I don't want to take your time up by repeating.

24 MR. ADAMO: If I just heard him right, he  
25 just said Lucent's a method claim. That is an entirely

1 different situation. We don't know what that method  
2 claim said. Those claims are not method claims. That's  
3 the entire point of this.

4 THE COURT: All right.

5 MR. ADAMO: They're system claims.

6 THE COURT: All right. Motion's denied.

7 What's next?

8 MR. SAYLES: All right. Ms. Frost is  
9 going to make a JMOL, if we have to make it today.

10 THE COURT: I want to get it done today  
11 where we can start off with the jury at 9:00 in the  
12 morning.

13 MR. SAYLES: Oh, Your Honor. We could  
14 make it at the end of our case, if the Court would  
15 permit us to. The rules allow that. So we don't have  
16 to make it in the morning. We're ready to start with  
17 the evidence in the morning.

18 THE COURT: I'd like to go ahead and hear  
19 it now.

20 MR. SAYLES: All right.

21 MR. ADAMO: I'm sorry, Your Honor.

22 MS. FROST: Your Honor, we have the right  
23 under Rule 50(a), as the Court is aware, under (2), to  
24 make our judgment -- motions for judgment as a matter of  
25 law at anytime before the case is to be submitted to the

1 jury, and that's our intention to do so. We are not  
2 prepared to make our motions at this time.

3 THE COURT: All right. We're adjourned.

4 COURT SECURITY OFFICER: All rise.

5 MR. ADAMO: Your Honor? Your Honor, I'm  
6 sorry. Could we get the time read --

7 THE COURT: Yes.

8 MR. ADAMO: -- for today? I'm sorry,  
9 Your Honor.

10 THE COURT: Plaintiff has used 6 hours  
11 and 50 -- I've got to give you a few minutes back there.

12 MR. ADAMO: Keep on with that thought,  
13 Judge. Great.

14 THE COURT: 6 hours and 47 minutes, and  
15 Defendant has used 3 hours and 13 minutes.

16 MR. ADAMO: Thank you very much, Your  
17 Honor. Appreciate it.

18 THE COURT: Y'all have a good evening.

19 MR. ADAMO: Good night, sir.

20 (Court adjourned.)

21

22

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24

25

1 C E R T I F I C A T I O N

2

3 I certify that the foregoing is a correct transcript  
4 from the record of proceedings in the above-entitled  
5 matter.

6

7 /s/

8 SHEA SLOAN, CSR, RPR

9 OFFICIAL COURT REPORTER

10 STATE OF TEXAS NO. 3081

11

12

13 /s/

14 JUDITH WERLINGER, CSR

15 DEPUTY OFFICIAL COURT REPORTER

16 STATE OF TEXAS NO. 267

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